Maybank Trustees Bhd (formerly known as Aseambankers Malaysia Bhd) v Amtrustee Bhd & Ors and other appeals

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCC)(W)-1696–08 OF 2017, W-02(NCC)(W)-1699–08 OF 2017, W-02(NCC)(W)-1708–08 OF 2017, W-02(NCC)(W)-1709–08 OF 2017, W-02(NCC)(W)-1710–08 OF 2017, W-02(NCC)(W)-2075–10 OF 2017, W-02(NCC)(W)-2077–10 OF 2017, W-02(NCC)(W)-2167–10 OF 2017 AND W-02(NCC)(W)-2168–10 OF 2017

NALINI PATHMANATHAN, BADARIAH SAHAMID AND ZABARIAH YUSOF JJCA

18 SEPTEMBER 2019

Companies and Corporations — Corporate bonds — Duties and liabilities of parties involved in setting up and implementing bond issuance scheme — Manner in which Securities Commission Act 1993 ('the SCA') (now the Capital Markets and Services Act 2007) regulated bond market in Malaysia — Role of information memorandum ('IM') in bond issuance scheme — Whether imperative for IM not to contain any false or misleading statement or material omission so as to protect investors — Whether efficient running of bond market required bond issuer and its agents/advisers to make full disclosure of all material information at all times

The first to the seventh respondents ('the bondholders') in the nine appeals herein brought an action in the High Court for losses they had suffered as a result of the failure of a multi-million ringgit bond issuance programme ('the bond programme') which was supposed to have had a life-span of 15 years but failed in its sixth year. The defendants in the action were Aldwich Enviro-Management Sdn Bhd ('AEM'), its wholly-owned subsidiary and issuer of the bonds, Aldwich Bhd ('Aldwich'), the owner, controller, alter-ego and directing mind of AEM and Aldwich, Kamalul Arifin Yusof ('Kamalul'), the lead arranger/principal adviser of the programme, Maybank Investment Bank Bhd ('MIBB'), the programme's trustee, Mayban Trustees Bhd ('MTB') and a firm of accountants, Ernst & Young ('EY'). AEM was in the business of waste processing and recovery and decided to venture into waste oil refining ('WOR') for which it needed a WOR plant. To raise the substantial funds required for the plant, AEM decided to incorporate Aldwich to issue bonds and notes to interested investors. The monies thereby raised were to be used to finance the construction of the WOR plant and also enable Aldwich to buy over AEM's entire business, assets and operations at a price to be determined from a valuation of AEM's business by EY. The bondholders, who subscribed for about RM177m of the bonds, were to be repaid periodically over 15 years from Aldwich's future business profits. To ensure that the bond programme fully

complied with the Securities Commission Act 1993 ('the SCA') (now the Capital Markets and Services Act 2007) and received the approval of the Securities Commission ('the SC'), various safeguards were put in place to ensure that revenue coming to Aldwich would be paid into a revenue account controlled by MIBB which would also operate four other designated accounts for specific purposes. One of the other four designated accounts was the debt service reserve account ('DSRA') into which monies payable to the bondholders were to be deposited. Another crucial feature of the bond programme was for all existing business contracts of AEM to be novated to Aldwich so that Aldwich would step into AEM's shoes and be entitled to receive all monies that were payable by creditors to AEM. The monies received were then to be assigned to MIBB for management. A due diligence working group ('DDWG') comprising AEM, Kamalul, MIBB, EY and a law firm, was formed with the ultimate objective of drafting an information memorandum ('IM') that was to be circulated to investors after it had been approved by the SC. The IM was akin to a prospectus depicting the structure and working of the bond programme. All members of the DDWG had to ensure and verify that all matters contained in the IM were true without there being any misleading or false statements or material omissions. Each DDWG member was also duty-bound to report any material discrepancy or change of event to MIBB for onward reporting to the SC. The SC eventually sanctioned the IM and the bond programme unaware that even before the bonds were issued the bond programme suffered from major flaws in that it was not what it was depicted to be in the IM and contravened many provisions of the SCA. Crucially, AEM's business contracts were not novated to Aldwich and revenue coming to AEM and Aldwich were not assigned to MIBB and the revenue account but remained with the recipients (AEM supposedly held monies it received on trust for Aldwich without the monies ever making it to the designated accounts). This material departure from the original structure of the bond programme removed any assurance that funds to repay the bondholders were secure. In fact, it enabled Aldwich and AEM, via Kamalul, to have full access to the funds. Although this fact was known to MIBB, MTB and EY even before the bonds were issued, no action was taken to remedy the situation or even to make disclosure of that fact to the SC or in the IM or to the bondholders. As a result, substantial funds which were supposed to have been paid into the revenue account and into the DSRA disappeared without a trace. According to the evidence, RM166m and another RM16.7m were transferred out from Aldwich's disbursement account in favour of AEM and Kamalul, respectively, without any accounting. By its sixth year, the bond programme failed, with Aldwich finding it unable to meet the repayments due to the bondholders causing them to declare an event of default and demand immediate repayment of their investments. Receivers and managers were appointed to take charge of the business and assets of AEM and Aldwich and despite selling off the WOR plant the bondholders were still owed a substantial sum of money. In their suit for recovery of the same against the various

appellants, the bondholders relied, as the case might be, upon breaches of statutory duties under the SCA, breach of the bond contracts as well as negligence as their causes of action. In a lengthy and detailed judgment (please see *AmTrustee Bhd & Ors v Aldwich Bhd (in receivership) & Ors* [2018] 7 MLJ 152 for a full report of the case) the High Court found Aldwich, AEM and Kamalul wholly liable to pay the bondholders RM177,248,747.30 ('the judgment sum') while MIBB, MTB and EY were found liable as joint tortfeasors in negligence to pay the bondholders 50%, 30% and 20%, respectively, of the judgment sum. The instant appeals were against the orders of the High Court. The common complaint of MIBB, MTB and EY was that the trial judge should have ordered the damages payable by them to be assessed. They said the order that they proportionately pay the same judgment sum that Aldwich, AEM and Kamalul were ordered to pay the bondholders was wrong and unjust. The following were some of the grounds of appeal raised by the respective appellants. *MIBB*: (1) the trial court failed to consider the 'Important Notice' disclaimer clause in the IM exonerating MIBB of liability for any false or misleading statement or material omission in the IM. In this regard, the trial court failed to follow the Federal Court's decision in *CIMB Bank Bhd v Maybank Trustees Bhd and other appeals* [2014] 3 MLJ 169 ('Pesaka') on the effect of such a disclaimer clause; (2) the trial court failed to appreciate that the real cause of the bondholders' loss was the failure of Aldwich's core business in catalyst recovery and not any act or omission on MIBB's part. This was supported by the fact that the bond programme only failed in its sixth year on account of a downturn in Aldwich's business. The bondholders failed to prove that MIBB was the proximate cause of their loss; (3) MIBB's duty was to only monitor monies that were deposited in the DESRA to pay the bondholders and not to monitor the revenue account to ensure that all monies received by Aldwich or AEM were deposited there; and (4) damages against MIBB should have been ordered to be assessed as MIBB could not be held liable for the amount that Aldwich owed the bondholders. If at all MIBB was liable, it was only for the balance value of the outstanding bonds in the sum of RM125,311,159.45 after deducting the proceeds of sale of the WOR plant. *MTB:* (1) the trial judge erred in finding MTB liable for breaching s 82 of the SCA. Section 82 did not apply to the bond programme as s 66(2) read together with paras 5, 8, 12 and 13 of Schedule 5 of the SCA suspended the application of s 82; (2) the trust deed and bond contracts did not require MTB to monitor whether the income earned by Aldwich was credited into the revenue account; and (3) the primary or proximate cause of the bondholders' loss was the collapse of Aldwich's business and not any breach of duty or negligence on MTB's part. *EY:* (1) the trial judge was wrong in: (a) finding EY liable for breaches of various duties under the SCA and for negligence, and (b) assessing the bondholders' loss at RM177,248,747.30 when that amount of loss was not proven. *Aldwich, AEM and Kamalul*: (1) the bondholders had no locus standi to sue Aldwich. Only MTB could commence the action on behalf of the bondholders under cl 12.4 of the trust deed; (2) the

bondholders had no right to recover their losses under ss 32B and/or 38 of the SCA because those sections were penal in nature and did not create any civil liability against Kamalul; and (3) the trial judge failed to give effect to cl 13.1 of the trust deed which limited the bondholders' claim against Aldwich to the realisation of secured property only.

Held, dismissing the appeals and affirming the decision of the High Court:

(1) The trial judge did not err in her findings as to liability and damages against the various appellants on the various causes of action pleaded (see paras 676 & 698).

(2) The trial judge was not wrong in apportioning liability between Aldwich, AEM and Kamalul as joint tortfeasors based on her assessment of their respective degrees of culpability. The causes of action against the trio were wholly different from those against MIBB, MTB and EY. It was not a case of a shared liability in terms of there being a primary and a secondary wrongdoer or defaulter; nor was it a case of accessory liability. Aldwich was sued as the primary debtor under the bond scheme for breach of statutory duty whilst AEM and Kamalul were sued for breach of trust and for breach of statutory duty. Aldwich, AEM and Kamalul were the parties who had siphoned off monies belonging to the bond scheme for their own use. Therefore, the causes of action against them were primarily for recovery of actual funds taken or utilised for their own use. In contrast, the cases against MIBB, MTB and EY were premised on negligence (apart from breaches of contract and statutory duty). If not for their breaches of duties, funds from Aldwich could not have been siphoned off/removed/diverted. They were the proximate cause of the losses suffered by the bondholders in varying degrees of culpability (see paras 678 & 680–685).

(3) The damages payable by MIBB, MTB and EY did not require assessment. The compensation the bondholders sought from them was equivalent to the losses they had suffered by reason of not recovering the monies they had loaned or invested under the bond scheme. That sum could be easily computed and comprised the debt due and owing by Aldwich to the bondholders, namely, RM177,248,747,31. As such, there was no need for further assessment of the loss. The quantum of loss suffered was the balance of the investment monies due to the bondholders if the scheme had proceeded to maturity. In the context of the SCA (now the CMSA 2007), the damages the bondholders were entitled to recover for

breaches of statutory duty ought to include, apart from the monies they had invested in the bond scheme, profits and interest they would have earned upon maturity of the bonds (see paras 687–688 & 696–697).

MIBB's appeal:

(4) MIBB was clearly obliged as lead arranger and adviser pre-bond issuance to ensure that the consent of the counterparties to the business contracts of AEM were assigned to MIBB as security agent under the bond programme and that evidence of same was available through service of such notices of assignment and the receipt of acknowledgment of such notices of assignment. MIBB failed to comply with this condition precedent ('CP') with the result that the said CP was unilaterally varied without disclosure to the SC or in the IM. Such material non-disclosure rendered the information contained in the IM false and misleading and MIBB was liable for breaches of ss 32B and 38(3) read with s 57 of the SCA as well as for breach of contract and for negligence (see paras 219–220 & 230).

(5) As security agent post-bond issuance, MIBB had a duty to ensure that proceeds from business contract counterparties of AEM and Aldwich flowed into the revenue account and from there went through the cascading structure that was designed to ensure control over the monies. This was never done. Having control of five of the six designated accounts and being their sole signatory, MIBB was under a duty to ensure that the waterfall nature of the flow of monies was strictly adhered to. Vide its statutory duties under the bond scheme, MIBB owed the bondholders a duty of care to ensure that information given to them was full and complete to enable them to make an informed decision as to whether or not to invest in the bond programme (see paras 239, 245–246 & 255).

(6) The proximate cause of the losses suffered by the bondholders was MIBB's failure to ensure that all CPs were fulfilled prior to the issuance of the bonds and its failure to inform the SC or the bondholders of the fact that the CPs were not complied with. If not for MIBB's acts and omissions, Kamalul, AEM and Aldwich could not have 'secreted' away business proceeds and profits. The bondholders were induced into investing in the programme by representations which were untrue prior to issuance of the bonds. MIBB knew the representations were false but chose not to make disclosure. These failures on MIBB's part caused the destruction of the original security features and design of the programme resulting

in a loss of the future proceeds of business and the ultimate loss suffered by the bondholders (see paras 264 & 266–267).

(7) MIBB could not rely on the 'Important Notice' disclaimer clause in the IM when, without disclosing to the SC or the investors or in the IM, it deliberately decided to alter the structure of the bond scheme such that the ring-fencing security features were jeopardised irrevocably. The 'Important Notice' could not absolve such deliberate breaches as that would render the statutory provisions of the SCA nugatory and impotent. *Pesaka* had no application to the instant case because in *Pesaka* the provisions of the SCA that featured in the instant case were not considered. In any event, *Pesaka* was not authority for the proposition that deliberate and calculated acts and omissions which put prospective subscribers at risk prior to the issuance of bonds could be absolved by such a disclaimer (see paras 286–288, 292–294, 299 & 318).

MTB's appeal:

(8) Although the trial judge erred in applying s 82 of the SCA to MTB, its liability under the trust deed as well as in negligence were fully made out (see paras 393–394).

(9) Although MIBB's acts/omissions were the most proximate cause of the losses suffered by the bondholders, MTB contributed or secondarily caused that loss by not acting as it had undertaken to do under the trust deed. MTB's omissions were particularly glaring, given that it was a professional trustee corporation. If MTB had performed its duties and obligations under the trust deed, understood the changes that were made to the structure, design and security features of the bond programme and alerted the bondholders of same or taken any other steps to protect their interests, the losses suffered by the bondholders would have been limited or lessened. As fiduciary to the bondholders, MTB was duty-bound under the trust deed to ensure that Aldwich complied with its responsibilities, that the movement of funds using the designated accounts was strictly adhered to and that the relevant parties such as MIBB or the bondholders were alerted in the event of any discrepancies. MTB's negligent omission to perform its duties satisfied the 'but for' test in terms of contributory causation and exacerbated the losses suffered by the bondholders (see paras 337–340, 345–350 & 390–392).

(10) MTB merely assumed that Aldwich had complied with the provisions of the trust deed and the bond contracts without ensuring that there was compliance in fact. More particularly, MTB failed to detect that monies were not being remitted as required under the cascading waterfall system which comprised a part of its duties to ensure with reasonable diligence that Aldwich was not in breach of its obligations. MTB did not carry out any form of due diligence in terms of books, accounts, auditing etc for six years or so. Aldwich's numerous breaches were only reported to the SC very late in the day to the detriment of the bondholders. MTB had simply ignored its various duties under the trust deed. The bondholders had made out their case against MTB for negligence as their relationship with MTB was sufficiently proximate for MTB to owe them a duty of care which was breached (see paras 378–379 & 381–382).

EY's appeals:

(11) As the financial adviser under the bond programme, EY was liable under s 38(3) of the SCA for making any false or misleading statements in the IM or for any material non-disclosure therein. EY undertook various duties in relation to the offer and issuance of the Aldwich bonds, including valuing AEM's business for the purpose of Aldwich's purchase of same and in certifying Aldwich's 15-year cash-flow projections. EY was part of the DDWG and contributed to the contents of the IM; it signed the verification report confirming the accuracy and completeness of the matters stated in the IM and approved the IM in its final form. EY was aware that potential investors would rely upon its valuation of AEM's business. Based on expert testimony, the trial judge concluded that EY's valuation of AEM's business was overinflated and therefore false and misleading. EY relied on cash-flow projections supplied by AEM which were speculative and unreliable and yet were included in the IM. Even after becoming aware that material changes were made to the bond structure which destroyed the security of the ring-fencing provisions, EY failed in its duty as adviser and as member of the Verification Committee in the bond programme to report the matter to the SC. The trial judge rightly found that EY had breached ss 38(3) and 32B(3) of the SCA and was accordingly liable under ss 57 and 153 of the SCA (see paras 472–473, 475, 482 & 487–492).

(12) By reason of EY's misleading valuation of AEM's business and its failure to make full disclosure to the SC of material alterations to

the bond scheme, EY breached its duty of care to the bondholders and caused or contributed to the losses they suffered by the collapse of the bond scheme. The element of causation was established against EY both for breach of statutory duties and in negligence (see paras 501, 528, 560–561 & 599–600).

(13) EY could not avoid liability for losses suffered by the bondholders by relying on either its contractual disclaimer with Aldwich or the 'Important Notice' disclaimer under the IM. By reason of privity of contract, EY's contractual disclaimer with Aldwich did not bind the bondholders whilst the disclaimer in the IM could not absolve EY for acts of negligence arising out of breach of duties under the SCA (see paras 562–587).

The appeals by Aldwich, AEM and Kamalul:

(14) The trial judge correctly held that the bondholders had locus standi to sue Aldwich. Their right to recovery could not be removed by cl 12.4 of the trust deed since that clause was only effective if the trustee itself had acted in compliance with the provisions of the trust deed. In the instant case, MTB was itself sued for acting in breach of the trust deed (see paras 611 & 615).

(15) Without the consensus of the bondholders, their right to fully recover the monies owing to them by Aldwich could not be restricted by cl 13 of the trust deed. The existence of cl 13 was never disclosed to the SC or in the IM. As such, the trial judge could not be faulted for invoking s 65 of the SCA to hold that cl 13 was void because the failure to disclose the existence of that clause was a breach of s 32B of the SCA affording the bondholders relief under ss 57 and 153 (see paras 619, 622 & 625).

(16) The trial judge made no error whatsoever whether on the facts or in law in concluding that Aldwich was wholly liable for the losses suffered by the bondholders (see para 631).

(17) On the facts and evidence, the trial judge rightly lifted the corporate veils of AEM and Aldwich to find that Kamalul had wrongfully used the corporate structures of both companies to commit various breaches of the bond covenants including the diversion of substantial funds. The bondholders had established that RM166m and another RM16.7m were transferred out over the years from Aldwich's disbursement account to AEM and Kamalul,

respectively, without any accounting. These were monies rightfully due to Aldwich and which should have gone towards repayment of the bondholders. Kamalul's failure to explain what had happened to the diverted funds justified the declaration of a constructive trust as against him and also AEM over the diverted funds and entitled the bondholders to trace those monies and recover them from Kamalul and AEM (see paras 637–641, 646, 653 & 674).

(18) AEM and Kamalul had breached their obligations under s 32B(1) and (3) of the SCA in failing to disclose to the SC and in the IM the material changes that were made to the Aldwich bond programme thereby making them liable to the bondholders for damages under ss 57 and/or 153 of the SCA (see paras 663–670).

[Bahasa Malaysia summary

Responden-responden pertama hingga ketujuh ('pemegang bon') dalam sembilan rayuan telah memulakan tindakan di Mahkamah Tinggi untuk kerugian yang mereka alami akibat kegagalan program terbitan bon berjuta ringgit ('program bon') yang sepatutnya mempunyai jangka hayat 15 tahun tetapi telah gagal dalam tahun keenamnya. Defendan-defendan dalam tindakan ini adalah Aldwich Enviro-Management Sdn Bhd ('AEM'), subsidiari milik sepenuhnya dan penerbit bon-bon, Aldwich Bhd ('Aldwich'), pemilik, pengawal, alter-ego dan pengarah minda AEM dan Aldwich, Kamalul Arifin Yusof ('Kamalul'), ketua pengatur/penasihat utama program, Maybank Investment Bank Bhd ('MIBB'), pemegang amanah program, Mayban Trustee Bhd ('MTB') dan firma akauntan, Ernst & Young ('EY'). AEM dalam perniagaan pemprosesan dan pemulihan sisa dan memutuskan untuk menceburkan diri dalam penapisan minyak sisa ('PMS') yang mana ia memerlukan logi PMS. Untuk mengumpulkan dana besar yang diperlukan untuk loji tersebut, AEM memutuskan untuk memperbadankan Aldwich untuk menerbitkan bon dan nota kepada pelabur yang berminat. Wang yang diperoleh dengan itu digunakan untuk membiayai pembinaan loji PMS dan juga membolehkan Aldwich membeli seluruh perniagaan, aset dan operasi AEM dengan harga yang akan ditentukan dari penilaian perniagaan AEM oleh EY. Pemegang bon, yang melanggan kira-kira RM177 juta bon tersebut, akan dibayar balik secara berkala selama 15 tahun dari keuntungan perniagaan Aldwich pada masa hadapan. Untuk memastikan bahawa program bon mematuhi sepenuhnya Akta Suruhanjaya Sekuriti 1993 ('SCA') (sekarang Akta Pasaran Modal dan Perkhidmatan 2007) dan mendapat persetujuan Suruhanjaya Sekuriti ('SS'), pelbagai perlindungan disediakan untuk memastikan bahawa pendapatan yang masuk ke Aldwich akan dibayarkan ke dalam akaun hasil yang dikawal oleh MIBB yang juga akan mengendalikan empat akaun lain yang ditentukan untuk tujuan tertentu. Salah satu daripada empat akaun lain yang ditetapkan adalah Akaun Rizab Perkhidmatan Hutang

('ARPH') di mana wang yang perlu dibayar kepada pemegang bon harus didepositkan. Ciri penting lain program bon tersebut adalah agar semua kontrak perniagaan AEM yang ada diserahkan kepada Aldwich agar Aldwich dapat mengambil alih AEM dan berhak menerima semua wang yang perlu dibayar oleh pemiutang kepada AEM. Wang yang diterima kemudiannya akan diserahkan kepada MIBB untuk pengurusan. Satu kumpulan kerja ketekunan wajar ('KKKW') yang terdiri daripada AEM, Kamalul, MIBB, EY dan sebuah firma undang-undang, telah ditubuhkan dengan objektif utama untuk merangka satu memorandum maklumat ('MM') yang adalah untuk diedarkan kepada pelabur selepas ia telah diluluskan oleh SS. MM adalah serupa dengan suatu prospektus menggambarkan struktur dan perjalanan program bon. Semua ahli KKKW perlu memastikan dan mengesahkan bahawa segala perkara yang terkandung di dalam MM benar tanpa ada sebarang kenyataan mengelirukan atau palsu atau peninggalan material. Setiap ahli KKKW juga bertanggungjawab untuk melaporkan sebarang percanggahan material atau perubahan acara untuk MIBB untuk seterusnya melaporkan kepada SS. SS akhirnya membenarkan MM dan program bon tidak menyedari bahawa sebelum bon itu diterbitkan, program bon mengalami banyak kekurangan kerana itu bukan seperti yang digambarkan dalam MM dan telah melanggar banyak peruntukan Akta. Pentingnya, kontrak perniagaan AEM tidak diserahkan kepada Aldwich dan pendapatan yang datang ke AEM dan Aldwich tidak diberikan kepada MIBB dan akaun hasil tetapi tetap bersama penerima (AEM kononnya menyimpan wang yang diterimanya atas amanah untuk Aldwich tanpa wang itu pernah sampai pun ke akaun yang ditetapkan). Lencongan material daripada struktur asal program bon ini melenyapkan apa-apa jaminan bahawa dana untuk membayar balik pemegang bon adalah selamat. Malah, ia membolehkan Aldwich dan AEM, melalui Kamalul, untuk mempunyai akses penuh kepada dana itu. Walaupun fakta ini diketahui MIBB, MTB dan EY sebelum bon diterbitkan, tiada tindakan diambil untuk membetulkan keadaan atau untuk membuat pendedahan mengenai fakta itu kepada SS atau dalam MM atau kepada pemegang bon. Hasilnya, dana yang besar yang sepatutnya telah dibayar ke dalam akaun hasil dan ke dalam ARPH hilang tanpa dapat dikesan. Mengikut keterangan, RM166 juta dan RM16.7 juta lagi telah dipindahkan keluar daripada akaun pembayaran Aldwich yang memihak kepada AEM dan Kamalul masing-masingnya, tanpa apa-apa perakaunan. Menjelang tahun keenam, program bon itu telah gagal, dan Aldwich mendapati ia tidak dapat memenuhi pembayaran balik kerana pemegang-pemegang bon menyebabkan mereka mengisytiharkan peristiwa ingkar dan menuntut pembayaran balik pelaburan mereka dengan segera. Penerima dan pengurus dilantik untuk mengurus perniagaan dan aset AEM dan Aldwich dan walaupun dengan menjual kilang PMS, pemegang bon masih berhutang sejumlah besar. Dalam tuntutan mereka untuk bayaran balik yang sama terhadap pelbagai perayu, pemegang bon bergantung, sebagaimana yang berlaku, atas pelanggaran kewajipan statutori di bawah Akta, pelanggaran kontrak bon serta kecuaian sebagai kausa tindakan mereka. Dalam

penghakiman yang panjang dan teliti (sila lihat kes *AmTrustee Bhd & Ors v Aldwich Bhd (in receivership) & Ors* [2018] 7 MLJ 152 untuk laporan penuh kes) Mahkamah Tinggi telah mendapati Aldwich, AEM dan Kamalul sepenuhnya bertanggungjawab sebagai pelaku tort bersama dalam kecuaian untuk membayar pemegang bon 50%, 30% dan 20%, masing-masingnya, daripada jumlah penghakiman itu. Rayuan-rayuan ini adalah terhadap perintah-perintah Mahkamah Tinggi. Aduan sama MIBB, MTB dan EY adalah bahawa hakim perbicaraan sepatutnya memerintahkan ganti rugi yang kena dibayar oleh mereka ditaksir. Mereka menyatakan perintah yang mereka perlu membayar mengikut bahagian sepertimana dalam jumlah jumlah penghakiman yang Aldwich, AEM dan Kamalul diperintahan untuk membayar pemegang bon adalah salah dan tidak adil. Berikut adalah beberapa alasan rayuan yang ditimbulkan oleh perayu-perayu masing-masingnya. *MIBB:* (1) mahkamah perbicaraan telah gagal mempertimbangkan klausa penafian 'Important Notice' dalam MM membebaskan MIBB daripada liabiliti untuk apa-apa kenyataan palsu atau mengelirukan atau peninggalan material dalam MM. Dalam hal ini, mahkamah perbicaraan telah gagal mengikut keputusan Mahkamah Persekutuan dalam kes *CIMB Bank Bhd v Maybank Trustees Bhd and other appeals* [2014] 3 MLJ 169 ('Pesaka') berhubung kesan klausa penafian sebegini; (2) mahkamah perbicaraan telah gagal memahami bahawa sebab sebenar kerugian pemegang non adalah kegagalan perniagaan teras Aldwich dalam pemulihan pemangkin dan bukan tindakan atau peninggalan di pihak MIBB. Ini disokong oleh kenyataan bahawa program bon hanya gagal pada tahun keenam kerana penurunan perniagaan Aldwich. Pemegang bon gagal membuktikan bahawa MIBB adalah penyebab kerugian mereka; (3) kewajipan MIBB hanya untuk memantau wang yang didepositkan ke dalam DESRA bagi membayar pemegang bon dan bukan untuk memantau akaun hasil bagi memastikan bahawa semua wang yang diterima oleh Aldwich atau AEM telah didepositkan di situ; dan (4) ganti rugi terhadap MIBB patut diperintahkan untuk ditaksir kerana MIBB tidak boleh dipertanggungjawabkan untuk jumlah yang Aldwich berhutang dengan pemegang-pemegang bon tersebut. Jika pun MIBB bertanggungjawab, ia hanya untuk baki nilai bon tertunggak sejumlah RM125,311,159.45 selepas ditolak hasil jualan loji PMS itu. *MTB:* (1) hakim perbicaraan terkhilaf dalam mendapati MTB bertanggungjawab kerana melanggar s 82 Akta. Seksyen 82 tidak terpakai kepada program bon itu kerana s 66(2) dibaca bersama perenggan-perenggan 5, 8, 12 dan 13 kepada Jadual 5 Akta telah menggantung permohonan s 82; (2) surat ikatan amanah dan kontrak-kontrak bon tidak memerlukan MTB untuk memantau sama ada pendapatan yang diperolehi oleh Aldwich telah dikreditkan ke dalam akaun hasil; and (3) sebab utama atau terdekat untuk kerugian pemegang-pemegang bon adalah keruntuhan perniagaan Aldwich dan bukan pelanggaran apa-apa kewajipan atau kecuaian di pihak MTB. *EY:* (1) Hakim perbicaraan terkhilaf kerana: (a) mendapati EY bertanggungjawab kerana pelanggaran pelbagai kewajipan di bawah Akta dan untuk kecuaian; dan (b) mentaksir kerugian pemegang-pemegang bon

sejumlah RM177,248,747.30 walhal jumlah kerugian tersebut tidak dibuktikan. *Aldwich, AEM ddan Kamalul:* (1) pemegang-pemegang bon tidak mempunyai locus standi untuk menyaman Aldwich. Hanya MTB boleh memulakan tindakan di pihak pemegang-pemegang bon di bawah klausa 12.4 surat ikatan amanah; (2) pemegang-pemegang bon tidak mempunyai hak untuk mendapat balik kerugian mereka di bawah ss 32B dan/atau 38 Akta kerana seksyen-seksyen tersebut bersifat hukuman dan tidak membentuk apa-apa liabiliti sivil terhadap Kamalul; (3) hakim perbicaraan telah gagal memberi kesan kepada klausa 13.1 surat ikatan amanah yang membataskan tuntutan pemegang-pemegang bon terhadap Aldwich untuk merealisasikan harta yang dijamin sahaja; dan (4) hakim perbicaraan tidak mempunyai asas untuk menyingkap tudung korporat Aldwich dan AEM dan untuk memegang Kamalul bertanggungjawab secara peribadi kepada pemegang-pemegang bon itu.

Diputuskan, menolak rayuan-rayuan dan mengesahkan keputusan Mahkamah Tinggi:

(1) Hakim perbicaraan tidak terkhilaf dalam penemuannya berhubung liabiliti dan ganti rugi terhadap pelbagai perayu-perayu berhubung pelbagai kausa tindakan yang dipli (lihat perenggan 676 & 698).

(2) Hakim perbicaraan tidak terkhilaf dalam pembahagian liabiliti antara Aldwich, AEM dan Kamalul sebagai pelaku tort bersama berdasarkan penilaiannya berhubung tahap kebersalahan mereka masing-masaingnya. Kausa tindakan terhadap mereka bertiga berbeza langsung dengan MIBB, MTB dan EY. Ia bukan kes liabiliti yang dikongsi berdasarkan pesalah atau orang yang ingkar sekunder; dan ia bukan kes liabiliti aksesori. Aldwich telah disaman sebagai penghutang utama di bawah skim bon kerana melanggar kewajipan statutori manakala AEM dan Kamalul di saman kerana melanggar amanah dan kerana melanggar kewajipan statutori. Aldwich, AEM dan Kamalul merupakan pihak-pihak yang menyalurkan wang milik skim bon itu untuk kegunaan mereka sendiri. Oleh itu, kausa-kausa tindakan terhadap mereka adalah terutamanya untuk mendapat balik dana sebenar yang telah diambil atau telah digunakan untuk kegunaan mereka sendiri. Sebaliknya, kes-kes terhadap MIBB, MTB dan EY berdasarkan kecuaian (selain pelanggaran kontrak dan kewajipan statutori). Jika bukan kerana pelanggaran kewajipan mereka, dana daripada Aldwich tidak mungkin disalurkan/dikeluarkan/dialihkan. Ia adalah sebab terdekat kerugian yang dialami oleh

pemegang-pemegang bon dalam pelbagai tahap kebersalahan (lihat perenggan 678 & 680–685).

(3) Ganti rugi yang kena dibayar oleh MIBB, MTB dan EY tidak memerlukan pentaksiran. Pampasan yang dipohon oleh pemegang-pemegang bon terhadap mereka adalah sama dengan kerugian yang dialami mereka oleh sebab tidak mendapat balik wang yang dipinjamkan atau dilaburkan oleh mereka di bawah skim bon itu. Jumlah tersebut dengan mudah dikira dan terdiri daripada hutang yang tertunggak dan kena dibayar oleh Aldwich kepada pemegang-pemegang bon itu, iaitu RM177,248,747,31. Oleh itu, tiada keperluan untuk taksiran kerugian selanjutnya. Kuantum kerugian yang dialami adalah baki wang pelaburan yang kena dibayar kepada pemegang-pemegang bon jika skim itu diteruskan sehingga matang. Dalam konteks Akta (sekarang APMP 2007), ganti rugi pemegang-pemegang bon berhak untuk mendapat balik kerana pelanggaran kewajipan statutori patut termasuk, selain daripada wang yang dilaburkan oleh mereka dalam skim bon itu, keuntungan dan faedah yang mereka patut peroleh apabila bon-bon itu matang (lihat perenggan 687–688 & 696–697).

Rayuan MIBB:

(4) MIBB jelas bertanggungjawab sebagai ketua pengurus dan penasihat keluaran pra-bon untuk memastikan bahawa persetujuan rakan sejawat kepada perniagaan AEM yang ditugaskan kepada MIBB sebagai ejen jaminan di bawah program bon dan bahawa keterangan yang sama tersedia melalui notis penyampaian dan pengakuan penerimaan notis-notis penyampaian. MIBB telah gagal untuk mematuhi prasyarat ini ('PS') dengan hasilnya PS tersebut secara unilateral berubah tanpa pendedahan kepada SS atau MM. Ketidakdedahan bahan tersebut menjadikan maklumat yang terkandung dalam MM palsu dan mengelirukan dan MIBB bertanggungjawab atas pelanggaran ss 32B dan 38(3) yang dibaca dengan s 57 Akta serta pelanggaran kontrak dan kecuaian (lihat perenggan 219–220 & 230).

(5) Sebagai ejen jaminan keluaran pasca bon, MIBB mempunyai kewajipan untuk memastikan bahawa hasil daripada kontrak perniagaan rakan sejawat AEM dan Aldwich mengalir ke dalam akaun hasil dan dari situ melalui struktur lata yang dirancang untuk memastikan kawalan ke atas wang itu. Ini tidak pernah berlaku. Kawalan ke atas lima daripada enam akaun yang ditetapkan dan

sebagai satu-satunya penandatangan mereka, MIBB di bawah kewajipan untuk memastikan bahawa sifat aliran wang itu dipatuhi dengan tegas. Melalui kewajipan statutorinya di bawah skim bon itu, MIBB berhutang dengan pemegang-pemegang bon itu satu kewajipan berjaga-jaga untuk memastikan bahawa maklumat yang diberikan kepada mereka adalah lengkap dan penuh untuk membolehkan mereka membuat keputusan yang tepat berhubung sama ada atau tidak untuk melabur dalam program bon (lihat perenggan 239, 245–246 & 255).

(6) Sebab terdekat kerugian yang dialami oleh pemegang-pemegang bon adalah kegagalan MIBB untuk memastikan bahawa semua PS telah dipenuhi sebelum keluaran bon itu dan kegagalannya untuk memberitahu SS atau pemegang-pemegang bon tentang fakta bahawa PS tersebut tidak dipatuhi. Jika bukan kepada tindakan dan peninggalan MIBB, Kamalul, AEM dan Aldwich tidak mungkin telah 'secreted' hasil dan keuntungan perniagaan itu. Pemegang-pemegang bon dipengaruhi untuk melabur dalam program itu melalui representasi yang tidak benar sebelum keluaran bon. MIBB mengetahui representasi tersebut adalah palsu tetapi memilih untuk tidak membuat pendedahan. Kegagalan tersebut di pihak MIBB menyebabkan kemusnahan ciri-ciri jaminan asal dan reka bentuk program yang mengakibatkan kerugian hasil masa hadapan perniagaan dan kerugian mutlak yang dialami oleh pemegang-pemegan bon (lihat perenggan 264 & 267–266).

(7) MIBB boleh tidak bergantung pada klausa penafian 'Important Notice' dalam MM apabila, tanpa mendedahkan kepada SS atau para pelabur atau dalam MM, ia dengan sengaja memutuskan untuk mengubah struktur skim bon itu sehinggakan ciri-ciri jaminan berpagar yang terjejas yang tidak boleh ditarik balik. 'Important Notice' itu tidak boleh membebaskan pelanggaran yang disengajakan itu kerana ia akan mennjadikan peruntukan statutori Akta tidak berguna dan lemah. *Pesaka* tidak terpakai dalam kes ini kerana dalam *Pesaka* peruntukan Akta yang dipaparkan dalam kes ini tidak dipertimbangkan. Dalam apa keadaan, *Pesaka* bukan autoriti untuk mempertahankan kenyataan bahawa perbuatan dan peninggalan yang sengaja dan dikira yang meletakkan bakal pelanggan berisiko sebelum keluaran bon boleh dibebaskan oleh penafian itu (lihat perenggan 286–288, 292–294, 299 & 318).

Rayuan MTB:

A

(8) Walaupun hakim perbicaraan terkhilaf dalam mengguna pakai s 82 Akta terhadap MTB, liabilitinya di bawah surat ikatan amanah dan juga kecuaian telah dibuktikan sepenuhnya (lihat perenggan 393–394).

B

(9) Walaupun tindakan/peninggalan MIBB adalah sebab terdekat untuk kerugian yang dialami oeh pemegang-pemegang bon, MTB telah menyumbang atau secara sekunder menyebabkan kerugian tersebut kerana tidak bertindak sebagaimana diakujanjinya untuk berbuat sedemikian di bawah surat ikatan amanah itu. Peninggalan MTB amat ketara, berdasarkan ia adalah pemegang amanah professional perbadanan. Jika MTB telah melaksanakan kewajipan dan tanggungjawabnya di bawah surat ikatan amanah, memahami perubahan yang dibuat kepada struktur, reka bentuk dan ciri-ciri jaminan program bon itu dan memberitahu pemegang-pemegang bon yang sama atau mengambil langkah lain untuk melindungi kepentingan mereka, kerugian yang ditanggung oleh pemegang bon akan dibatasi atau dikurangkan. Sebagai fidusiari kepada pemegang-pemegang bon, MTB terikat dengan kewajipan di bawah surat ikatan amanah untuk memastikan bahawa Aldwich mematuhi tanggungjawabnya, bahawa pergerakan dana menggunakan akaun yang ditentukan telah dipatuhi dengan ketat dan bahawa pihak-pihak yang berkenaan seperti MIBB atau pemegang-pemegang bon diberitahu sekiranya berlaku percanggahan. Peninggalan kecuaian MTB untuk melaksanakan kewajipannya memenuhi ujian 'but for' dari segi kausa penyebab dan menyebabkan kerugian yang dialami oleh pemegang-pemegang bon (lihat perenggan 337–340, 345–350 & 390–392).

C

D

E

F

G

(10) MTB hanya mengandaikan bahawa Aldwich telah mematuhi peruntukan surat ikatan amanah dan kontrak bon tanpa memastikan bahawa sebenarnya terdapat kepatuhan. Lebih khusus lagi, MTB telah gagal mengesan bahawa wang tidak diremitkan seperti yang dikehendaki di bawah sistem saluran yang merangkumi sebahagian kewajipannya untuk memastikan dengan ketekunan yang wajar bahawa Aldwich tidak melanggar tanggungjawabnya. MTB tidak melaksanakan apa-apa bentuk ketekunan wajar dari segi buku, akaun, pengauditan dan sebagainya selama enam tahun atau lebih. Banyak pelanggaran Aldwich hanya dilaporkan kepada SS pada saat akhir sehingga merugikan pemegang-pemegang bon. MTB memang mengabaikan pelbagai kewajipannya di bawah surat ikatan

H

I

amanah. Pemegang-pemegang bon telah membuktikan kes mereka terhadap MTB kerana kecuaian di mana hubungan mereka dengan MTB cukup dekat untuk MTB untuk mempunyai kewajipan berjaga-jaga terhadap mereka yang dilanggari (lihat perenggan 378–379 & 381–382).

Rayuan EY:

(11) Sebagai penasihat kewangan di bawah program bon, EY bertanggungjawab di bawah s 38(3) Akta kerana membuat penyataan palsu atau mengelirukan dalam MM atau untuk sebarang pendedahan penting di dalamnya. EY menjalankan pelbagai tugas berkaitan dengan tawaran dan penerbitan bon Aldwich, termasuk menilai perniagaan AEM untuk tujuan pembelian Aldwich yang sama dan mengesahkan unjuran aliran tunai 15 tahun Aldwich. EY adalah sebahagian daripada KKKW dan menyumbang kepada kandungan MM; ia menandatangani laporan pengesahan yang mengesahkan ketepatan dan kelengkapan perkara yang dinyatakan dalam MM dan meluluskan MM dalam bentuk terakhirnya. EY menyedari bahawa bakal pelabur akan bergantung pada penilaian perniagaan AEM. Berdasarkan keterangan pakar, hakim perbicaraan menyimpulkan bahawa penilaian EY terhadap perniagaan AEM terlalu banyak dan oleh itu palsu dan menyesatkan. EY bergantung pada unjuran aliran tunai yang dibekalkan oleh AEM yang spekulatif dan tidak boleh dipercayai namun telah dimasukkan ke dalam MM. Walaupun setelah menyedari bahawa perubahan penting telah dibuat pada struktur bon yang merosakkan keselamatan peruntukan pengikat tali, EY gagal dalam tugasnya sebagai penasihat dan sebagai anggota Jawatankuasa Pengesahan dalam program bon untuk melaporkan perkara itu kepada SS. Hakim perbicaraan dengan tepat mendapati bahawa EY telah melanggar ss 38(3) dan 32B(3) Akta dan dengan itu bertanggungjawab di bawah ss 57 dan 153 Akta (lihat perenggan 472–473, 475, 482 & 487–492).

(12) Oleh kerana penilaian EY yang mengelirukan terhadap perniagaan AEM dan kegagalannya untuk membuat pendedahan sepenuhnya kepada SS mengenai perubahan ketara terhadap skim bon, EY melanggar kewajibannya untuk menjaga pemegang bon dan menyebabkan atau menyumbang kepada kerugian yang mereka alami akibat kegagalan skim bon itu. Elemen penyebab dapat dibuktikan terhadap EY untuk pelanggaran kewajipan statutori dan juga untuk kecuaian (lihat perenggan 501, 528, 560–561 & 599–600).

(13) EY tidak dapat mengelakkan tanggungjawab untuk kerugian yang dialami oleh pemegang-pemegang bon dengan bergantung pada penafian kontraknya dengan Aldwich atau penafian 'Important Notice' di bawah MM. Oleh kerana priviti kontrak, penafian kontrak EY dengan Aldwich tidak mengikat pemegang-pemegang bon sementara manakala penafian dalam MM tidak dapat membebaskan EY untuk tindakan kecuaian yang timbul akibat pelanggaran kewajipan di bawah Akta (lihat perenggan 562–587).

Rayuan oleh Aldwich, AEM dan Kamalul:

(14) Hakim perbicaraan dengan betul menyatakan bahawa pemegang bon mempunyai lokus standi untuk menuntut Aldwich. Hak mereka untuk pengambilan semula tidak dapat dikeluarkan oleh klausa 12.4 surat ikatan amanah kerana klausa itu hanya berkesan jika Pemegang Amanah itu sendiri bertindak mematuhi surat ikatan amanah. Dalam kes ini, MTB sendiri telah disaman kerana bertindak melanggar surat ikatan amanah (lihat perenggan 611 & 615).

(15) Tanpa persetujuan pemegang-pemegang bon, hak mereka untuk mendapatkan balik sepenuhnya wang yang terhutang kepada mereka oleh Aldwich tidak dapat dihalang oleh klausa 13 surat ikatan amanah. Kewujudan klausa 13 tidak pernah didedahkan kepada SS atau dalam MM. Oleh demikian, hakim perbicaraan tidak boleh disalahkan kerana menggunakan s 65 Akta untuk memutuskan bahawa klausa 13 adalah tidak sah kerana kegagalan untuk mendedahkan kewujudan klausa itu adalah pelanggaran s 32B Akta yang memberikan relief kepada pemegang-pemegang bon di bawah ss 57 dan 153 (lihat perenggan 619, 622 & 625).

(16) Hakim perbicaraan tidak terkhilaf sama ada pada fakta atau undang-undang dalam membuat kesimpulan bahawa Aldwich bertanggungjawab sepenuhnya atas kerugian yang dialami oleh pemegang-pemegang bon (lihat perenggan 631).

(17) Berdasarkan fakta dan keterangan, hakim perbicaraan telah menyingkap tudung korporat AEM dan Aldwich untuk mendapati bahawa Kamalul telah salah menggunakan struktur korporat kedua-dua syarikat untuk melakukan pelbagai pelanggaran wang bon termasuk pengalihan dana yang besar. Pemegang-pemegang bon telah membuktikan bahawa RM166 juta dan RM16.7 juta lagi telah selama bertahun-tahuannya dipindah keluar dari akaun

pengeluaran Aldwich kepada AEM dan Kamalul, masing-masingnya, tanpa apa-apa perakaunan. Ini adalah wang yang sepatutnya kena dibayar kepada Aldwich dan yang sepatutnya digunakan untuk pembayaran balik pemegang-pemegang bon. Kegagalan Kamalul untuk menjelaskan apa yang terjadi pada dana yang dialihkan itu membenarkan deklarasi amanah konstruktif terhadapnya dan juga AEM atas dana yang dialihkan dan memberi hak kepada pemegang-pemegang bon untuk mengesan wang tersebut dan mendapatkannya balik daripada Kamalul dan AEM (lihat perenggan 637–641, 646, 653 & 674).

(18) AEM dan Kamalul telah melanggar tanggungjawab mereka di bawah ss 32B(1) dan (3) Akta kerana gagal untuk mendedahkan kepada SS dan dalam MM perubahan penting yang telah dibuat kepada program bon Aldwich yang mejadikan mereka bertanggungjawab kepada pemegang-pemegang bon untuk ganti rugi di bawah ss 57 dan/atau 153 Akta (lihat perenggan 663–670).]

Cases referred to

Barclays Bank plc v Grant Thornton UK LLP [2015] EWHC 320 (Comm), QBD (refd)

Barnett v Chelsea and Kensington Hospital Management Committee [1969] 1 QB 428, QBD (refd)

Bartlett and others v Barclays Bank Trust Co Ltd (Nos 1 and 2) [1980] Ch 515, Ch D (folld)

Bonnington Castings Ltd v Wardlaw [1956] 1 All ER 615, HL (refd)

CIMB Bank Bhd v Anthony Lawrence Bourke & Anor [2019] 2 MLJ 1; [2019] 2 CLJ 1, FC (refd)

CIMB Bank Bhd v Maybank Trustees Bhd and other appeals [2014] 3 MLJ 169, FC (distd)

Caparo Industries plc v Dickman [1990] 2 AC 605, HL (distd)

Dartberg Pty Ltd v Wealthcare Financial Planning Pty Ltd [2007] FCA 1216, FC (refd)

Davis Contractors Ltd v Fareham Urban District Council [1956] AC 696, HL (refd)

Deloitte Haskins & Sells v National Mutual Life Nominees Ltd [1993] AC 774, PC (distd)

Environment Agency (formerly National Rivers Authority) v Empress Car Co (Abertillery) Ltd [1999] 2 AC 22, HL (refd)

Faiza Ben Hashem v Abdulhadi Ali Shayif and another [2008] EWHC 2380 (Fam), HC (refd)

Fomento (Sterling Area) Ltd v Selsdon Fountain Pen Co Ltd, Selsdon and Selsdon [1958] 1 WLR 45, HL (refd)

Giga Engineering & Construction Sdn Bhd v Yip Chee Seng & Sons Sdn Bhd &

A *Anor* [2015] 6 MLJ 449, FC (distd)
Gross v Pentz [1996] ZASCA 78, SC (refd)
Gurbachan Singh s/o Bagawan Singh & Ors v Vellasamy s/o Pennusamy & Ors (on their behalf and for the 213 sub-purchasers of plots of land known as PN35553, Lot 9108, Mukim Hutan Melintang, Hilir Perak) and other appeals [2015] 1
B MLJ 773, FC (refd)
Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] AC 465, HL (refd)
Henville and Another v Walker and Another (2001) 182 ALR 37, HC (refd)
IFE Fund SA v Goldman Sachs International [2006] EWHC 2887 (Comm), QBD (refd)
C *JP Morgan Chase Bank and others v Springwell Navigation Corp* [2008] All ER (D) 167 (Jun), QBD (distd)
JEB Fasteners Ltd v Marks, Bloom & Co (a firm) [1981] 3 All ER 289, QBD (refd)
JSI Shipping (S) Pte Ltd v Teofoongwonglcloong (a firm) [2007] 4 SLR
D 460; [2007] SGCA 40, CA (folld)
Killick and another v PriceWaterhouseCoopers (a firm) [2000] All ER (D) 928; [2001] PNLR 1, Ch D (refd)
Lok Kok Beng & 49 Ors v Loh Chiak Eong & Anor [2015] 4 MLJ 734; [2015] 7 CLJ 1008, FC (refd)
E *London and General Bank (No 2), In re* [1895] 2 Ch 673, CA (refd)
Law Society v KPMG Peat Marwick (sued as KPMG Peat Marwick McLintock) and others [2000] 1 All ER 515, Ch D (refd)
Marks (in a representative capacity) & Others v GIO Australia Holdings & Others (1998) 158 ALR 333, HC (refd)
F *Maybank Islamic Berhad v Aldwich Enviro-Management Sdn Bhd* [2015] MLJU 1977; [2016] 1 AMCR 272, HC (refd)
Mercedes Holdings Pty Ltd and Others v Waters and Others (No 2) (2010) 78 ACSR 118, FC (distd)
Minories Finance Ltd v Arthur Young (a firm) (Bank of England, third party);
G *Johnson Matthey plc v Arthur Young (a firm) (Bank of England, third party)* [1989] 2 All ER 105, QBD (refd)
Murphy v Overton Investments Pty Ltd (2004) 216 CLR 388, HC (refd)
Pearce v European Reinsurance Consultants and Run-Off Ltd and others [2005] EWHC 1493 (Ch); [2006] PNLR 8, Ch D (refd)
H *Prest v Petrodel Resources Ltd* [2013] 4 All ER 673; [2013] UKSC 34, SC (refd)
Pushpaleela a/p R Selvarajah & Anor v Rajamani d/o Meyappa Chettiar and other appeals [2019] 2 MLJ 553; [2019] 3 CLJ 441; [2019]1 LNS 61, FC (refd)
Royal Bank of Scotland plc v Bannerman Johnstone Maclay (a firm) [2005] CSIH 39 (folld)
I *Ruslan Baharin Industries Sdn Bhd & Ors v Government of Malaysia* [2009] 5 MLJ 63; [2010] 7 CLJ 713, CA (refd)
SEA Housing Corporation Sdn Bhd v Lee Poh Choo [1982] 2 MLJ 31, FC (folld)
Scruttons v Midland Silicones Ltd [1962] 1 All ER 1, HL (refd)
Tenaga Nasional Malaysia v Batu Kemas Industri Sdn Bhd and another [2018] 5

MLJ 561; [2018] 6 CLJ 683, FC (refd)
Tesco Supermarkets Ltd v Nattrass [1971] 2 All ER 127; [1971] UKHL 1, HL (refd)
Ultramares Corp v Touche, Niven & Co 255 NY 170; 174 NE 441, CA (refd)
United Project Consultants Pte Ltd v Leong Kwok Onn (trading as Leong Kwok Onn & Co) [2005] 4 SLR 214, CA (refd)
Wallersteiner v Moir, Moir v Wallersteiner [1974] 1 WLR 991, CA (refd)
Waterman's Will Trusts; Lloyds Bank Ltd v Sutton and Others, Re [1952] 2 All ER 1054, Ch D (refd)
Wu Siew Ying t/a Fuh Lin Bud-Grafting Centre v Gunung Tunggal Quarry & Construction Sdn Bhd & Anor [2011] 2 MLJ 1; [2011] 1 CLJ 409, FC (refd)

Legislation referred to

Capital Markets And Services Act 2007 ss 214, 229, 230, 248, 256, 273, 276, 357, Schedules 6, 7
Civil Law Act 1956 s 10
Companies Act 1965 (repealed by Companies Act 2016)
Companies Act 2016
Contracts Act 1950 s 29
Corporations Act 2001 [AU]
Corporations Act 1989 [AU]
Evidence Act 1950 s 114(g)
Housing Developers (Control and Licensing) Act 1966
Misrepresentation Act 1967 [UK] s 2
Securities Commission Malaysia Act 1993 s 2, 2(1), 15(1)(g), (1)(i), 32, 32B, 32B(1), (2), (3), (4), 35, 36, 37, 38, 38(1)(b), (3), (3)(a), (3)(b), 39, 39(3), 40, 40(1), 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 57(a), (d), (e), (f), 58, 59, 60, 61, 62, 63, 64, 65, 66(2), 67, 82, 85, 85(1) (2), (3), 153, 328, Schedule 2, 3, 5, Parts I, II, III, Part IV, Divisions 1, 2, 3, 4, Parts V, VI, VII
Solicitors Act 1974 [UK]
Trade Practices Act [AU]
Trustee Act 1949

Appeal from: Civil Suit No D-22NCC-1622–11 of 2012 (High Court, Kuala Lumpur)

Robert Lazar (Lai Wai Fong, TT Toi and Aarthi Jeyarajah with him) (Shearn Delamore & Co) in Civil Appeal Nos W-02(NCC)(W)-1696–08 of 2017, W-02(NCC)(W)-1699–08 of 2017, W-02(NCC)(W)-2075–10 of 2017 and W-02(NCC)(W)-2077–10 of 2017 for the appellant.
Gopal Sri Ram (V Manokaran, Emily Wong, Magita Hari Mogan and How Li Nee with him) (Kumar Assoc) in Civil Appeal No W-02(NCC)(W)-1708–08 of 2017 for the appellant.
V Manokaran (MR Kumar and N Yohendra with him) (Netto & Yohendra) in

Civil Appeal No W-02(NCC)(W)-1709–08 of 2017 for the appellant.

Cyrus Das (Kelvin Seet Wan Nam, Vendee Chai, Lim Lay Yee with him) (Cheang & Ariff) in Civil Appeal Nos W-02(NCC)(W)-1710–08 of 2017, W-02(NCC)(W)-2167–10 of 2017 and W-02(NCC)(W)-2168–10 of 2017 for the appellant.

Alan Gomez (Ganesan Nethi, Michael Yap and Daniel Tan with him) (Tommy Thomas) in Civil Appeal Nos W-02(NCC)(W)-1696–08 of 2017, W-02(NCC)(W)-1699–08 of 2017, W-02(NCC)(W)-1708–08 of 2017, W-02(NCC)(W)-1709–08 of 2017, W-02(NCC)(W)-1710–08 of 2017, W-02(NCC)(W)-2075–10 of 2017, W-02(NCC)(W)-2077–10 of 2017 and W-02(NCC)(W)-2167–10 of 2017 for the first to seventh respondents.

Gopal Sri Ram (V Manokaran, Emily Wong, Magita Hari Mogan and How Li Nee with him) (Kumar Assoc) in Civil Appeal Nos W-02(NCC)(W)-1696–08 of 2017, W-02(NCC)(W)-1699–08 of 2017, W-02(NCC)(W)-1710–08 of 2017, W-02(NCC)(W)-2075–10 of 2017, W-02(NCC)(W)-2077–10 of 2017 and W-02(NCC)(W)-2167–10 of 2017 for the eighth respondent.

V Manokaran (Kumar and N Yohendra with him) (Netto & Yohendra) in Civil Appeal Nos W-02(NCC)(W)-1696–08 of 2017, W-02(NCC)(W)-1699–08 of 2017, W-02(NCC)(W)-1710–08 of 2017, W-02(NCC)(W)-2075–10 of 2017, W-02(NCC)(W)-2077–10 of 2017, W-02(NCC)(W)-2167–10 of 2017 and W-02(NCC)(W)-2168–10 of 2017 for the ninth and tenth respondents.

Cyrus Das (Kelvin Seet Wan Nam, Vendee Chai and Lim Lay Yee with him) (Cheang & Ariff) in Civil Appeal Nos W-02(NCC)(W)-1696–08 of 2017 and W-02(NCC)(W)-1699–08 of 2017 for the eleventh respondent.

Robert Lazar (Lai Wai Fong, TT Toi and Aarthi Jeyarajah with him) (Shearn Delamore & Co) in Civil Appeal Nos W-02(NCC)(W)-1710–08 of 2017 and W-02(NCC)(W)-2167–10 of 2017 for the eleventh and twefth respondents.

Nalini Pathmanathan JCA:

INTRODUCTION

[1] Corporate bonds in Malaysia's capital market relative to its domestic gross product are ranked the third largest in Asia (see *Capital Markets-Discipline and Misconduct* by Loh Siew Cheang, Tan Ming-li and Evelyn Chan published by *LexisNexis* (1st Ed, 2019)). Its rapid growth is attributable in large part (apart from the economy), to the existence of a comprehensive legislative regulatory framework established initially under the Securities Commission Act 1993 ('the SCA') , and presently under the Capital and Markets and Services Act 2007 ('the CMSA').

[2] This series of nine appeals relates to the regulation of corporate bonds in the Malaysian capital market, under the previous regulatory regime of the SCA 1993. More specifically, these appeals address the incidence and extent of the

duties and liabilities of the various actors in the capital market field more particularly the bond market, both prior to the issuance of corporate bonds, and the situation post-issuance when default occurs, culminating in the failure of the corporate bond issue. This in turn caused sizeable losses, ultimately borne by the investors, ie the bondholders. These issues are considered under the then prevailing statutory regulation regime in 2002 and 2003, as well as in contract and negligence.

[3] The actors referred to comprise the various parties to these appeals, namely the issuer and its related parties, the lead arranger, the bond trustee and the accountants. The appeals arise as a consequence of the decision of the High Court, which found these actors, who were defendants before it, liable in varying degrees to the bondholders.

[4] The specific claim of the bondholders arises by reason of losses suffered as a consequence of a catastrophic failure of the Aldwich Bond Programme valued at RM308m at its inception in 2003. The programme was supposed to span a period of 15 years, from issuance to maturity. The bond issuance was accorded a triple A rating at inception. Notwithstanding this, the bond failed in its sixth year, in 2009.

[5] The trial judge in the court below accepted and found that a sum of RM265m in Aldwich Bhd's (Aldwich's) income and funds was simply not captured nor 'ring-fenced' as it was meant to under the near infallible design and structure of the Aldwich Bond Programme, both pre- and post-bond issuance. It was also found in the court below that the Aldwich bonds were considerably overvalued at inception, resulting in the issuance of a far greater value of bonds than actually warranted.

[6] These findings resulted in the trial judge finding complete culpability on the part of the issuer, Aldwich and its related entity and persona (Aldwich Enviro-Management Sdn Bhd ('AEM') and Kamalul Arifin Yusof ('Kamalul') as the alter-ego of both Aldwich and AEM. The trial judge also found the lead arranger or principal adviser, Maybank Investment Bank Bhd ('MIBB') liable to the extent of 50%, the trustee, Mayban Trustees Bhd ('Mayban Trustees') liable to the extent of 30% and the auditors, Ernst & Young ('EY') liable to the extent of 20%. These findings gave rise to the nine appeals that fall for consideration here.

PART I

Parties to the appeals

A **[7]** In the original suit some of the bondholders comprised the plaintiffs who had subscribed for the bonds, namely Aldwich bonds. They held in aggregate bonds having a nominal value of one hundred and seventy two million Ringgit (RM172m). They are the first to seventh respondents in the appeal. They will be referred to as the bondholders.

B

[8] All of the defendants in the High Court filed appeals against the decision of the learned High Court judge after a full trial lasting thirty-seven days. The decision of the High Court gave rise to this series of nine appeals, which are dealt with collectively in this single judgment. The appeals were, by consent, heard together over a period of nine days.

C

[9] The first defendant in the High Court was *Aldwich* (now in receivership). It is the appellant in Appeal No W-02(NCC)(W)-1708–08 of 2017.

D

[10] Aldwich was a special purpose vehicle incorporated in 2002 to acquire the business of catalyst recovery, tank cleaning and waste oil recovery from its parent company, AEM for the purposes of the bond programme. Aldwich is the entity that issued the bonds. The High Court found Aldwich wholly liable for the losses suffered by the bondholders and awarded judgment against it in the principal sum of RM177,248,747.30 ('judgment sum').

E

[11] The second defendant in the High Court was *AEM* that sold its businesses and operations as part of the bond programme. Aldwich was its wholly-owned subsidiary. It is an appellant in Appeal No W-02(NCC)(W)-1709–08 of 2017 together with Aldwich. It too was found wholly liable for the losses suffered by the bondholders ie in respect of the entirety of the judgment sum.

F

G

[12] The third defendant in the High Court was *Kamalul*, a substantial shareholder of AEM and found by the High Court judge to be the alter-ego of both AEM and Aldwich. He is the second appellant in Appeal No W-02(NCC)(W)-1709–08 of 2017. The High Court found that as the alter-ego of both AEM and Aldwich, Kamalul as the primary perpetrator who had diverted substantial quantities of monies either directly or through the two entities was wholly liable for the losses suffered by the bondholders, in the judgment sum.

H

I

[13] The fourth defendant in the High Court was *MIBB.* It is the appellant in Appeal Number W-02(NCC)(W)-1699–08 of 2017. MIBB carried out multiple roles pre- and post-bond issuance. It was the adviser, lead arranger, facility agent, security agent and project agent of the bond programme, besides being a primary subscriber of the bonds. The High Court found MIBB was

culpable for the losses suffered by the bondholders, in its various capacities, although not wholly so. Liability was apportioned at 50 per cent of the judgment sum.

[14] The fifth defendant in the High Court was *Mayban Trustees Bhd,* who was the trustee for the bondholders under a trust deed. It is the appellant in W-02(NCC)(W)-1696–08 of 2017. It will be referred to as Mayban Trustees in this judgment. The High Court found that it had failed to carry out its duties and obligations post-issuance of the bonds, as required under the trust deed and apportioned liability against it at 30 per cent of the judgment sum.

[15] The sixth defendant in the High Court was *Ernst & Young* ('EY'), the valuation accountant that had carried out the analysis and certification of Aldwich's cash flow projection pre-bond issuance, and the reporting accountant post-bond issuance, particularly in relation to the debt service cover ratio ('DSCR'). It is the appellant in Appeal Nos W-02(NCC)(W)-1710–08 of 2017, W-02(NCC)(W)-2167–10 of 2017 and W-02(NCC)(W)-2168–10 of 2017. It will be referred to as EY in this judgment.

[16] The High Court found that EY had been negligent in its analysis and certification of Aldwich's cash flow projection which comprised the basis for the valuation of the Aldwich bonds under the information memorandum ('IM') prior to the issuance of the bonds, and had failed to comply with its reporting duties as a reporting accountant post-issuance. Liability was apportioned at 20% of the judgment sum.

Summary of the key background facts

[17] We have adopted and modified the summarisation of the factual background from the parties' respective submissions and the judgment of the High Court.

AEM'S NEED FOR THE RAISING OF FUNDS THROUGH THE ISSUANCE OF PRIVATE DEBT SECURITIES ('PDS')

[18] AEM was incorporated in 1996 and was in the business of providing environmental management services. By 2001, AEM operated a catalyst recovery plant and a tank cleaning business. From the IM relating to the bond programme, AEM was described as a specialised scheduled waste processor, which had the capacity to recover multiple precious metals. It undertook waste recycling, recovery and reuse services, providing environmental related services in Malaysia. It occupied a dominant market position in the business of waste recovery.

[19] As such, it enjoyed numerous contracts with large corporate clients like several Petronas Group companies, BASF and the Optimal Group in relation to its catalyst recovery operations. The clients who purchased AEM's precious metals (after recovery) included Umicore of Belgium, OMG of Germany, Johnson Matthey in the United Kingdom and HSBC, London.

PROPOSED EXPANSION INTO WASTE OIL REFINING ('WOR')

[20] In 2002, AEM sought to venture into the business of waste oil refinery ('WOR') which involved the construction of a WOR plant. Substantial funds were necessary, and AEM opted to obtain this funding through the issuance of PDS in the form of bonds and notes to be subscribed for by potential investors ('the Aldwich Bond Programme'). Kamalul was in control of AEM at the time and thereafter.

THE ALDWICH BOND PROGRAMME

[21] In order to facilitate this fund-raising programme through the issuance of bonds, Aldwich, the issuer, was incorporated as a special purpose vehicle. Aldwich, which was a wholly-owned subsidiary of AEM, would then acquire the businesses of AEM for a sale consideration, to be financed largely by the bondholders. There would also be financing required for the construction of the WOR plant. This too, would be financed, inter alia, by the bondholders. The bondholders would be repaid through the future profits generated by Aldwich over a period of fifteen years.

[22] It is pertinent that throughout this programme, Kamalul retained control of the special purpose vehicle, Aldwich, through AEM.

THE BUSINESS SALE AGREEMENTS ('BSAS')

[23] The mechanism by which such funds were to be raised by AEM was through the execution of two agreements between AEM and Aldwich:

(a) business sale agreement 1 (BSA 1) pursuant to which Aldwich would purchase from AEM all business assets and operations relating to its existing catalyst recovery and tank cleaning business. Aldwich would procure funding from potential investors of the bonds to enable it to pay AEM the purchase price; and

(b) business sale agreement 2 (BSA 2) pursuant to which Aldwich would purchase the business, assets and operations of AEM relating to its WOR plant. Aldwich would also on-lend RM50m to AEM to finance in part the construction of a WOR plant by AEM. This too would be financed (in part) by potential bondholders.

[24] In connection with this sale, EY performed a valuation of AEM's businesses to compute the proposed purchase price. EY's indicative valuation report dated 31 December 2002 was stated to be for the express purpose of facilitating the determination of the purchase consideration for the Aldwich Bond Programme. EY adopted the discounted cash flow method in carrying out its valuation of the business.

[25] AEM's business was valued within the range of RM308.7m (lower end) to RM381.5m (higher end) as of December 2002. The transfer consideration was fixed at the lower value of RM308.7m. Of this total sum, RM176m was required in cash. This was to come from potential investors in the form of the senior bondholders (some of whom comprise the respondents). Junior notes were issued by Aldwich to AEM to fund the remaining consideration of RM132m for the transfer of the business from AEM to Aldwich.

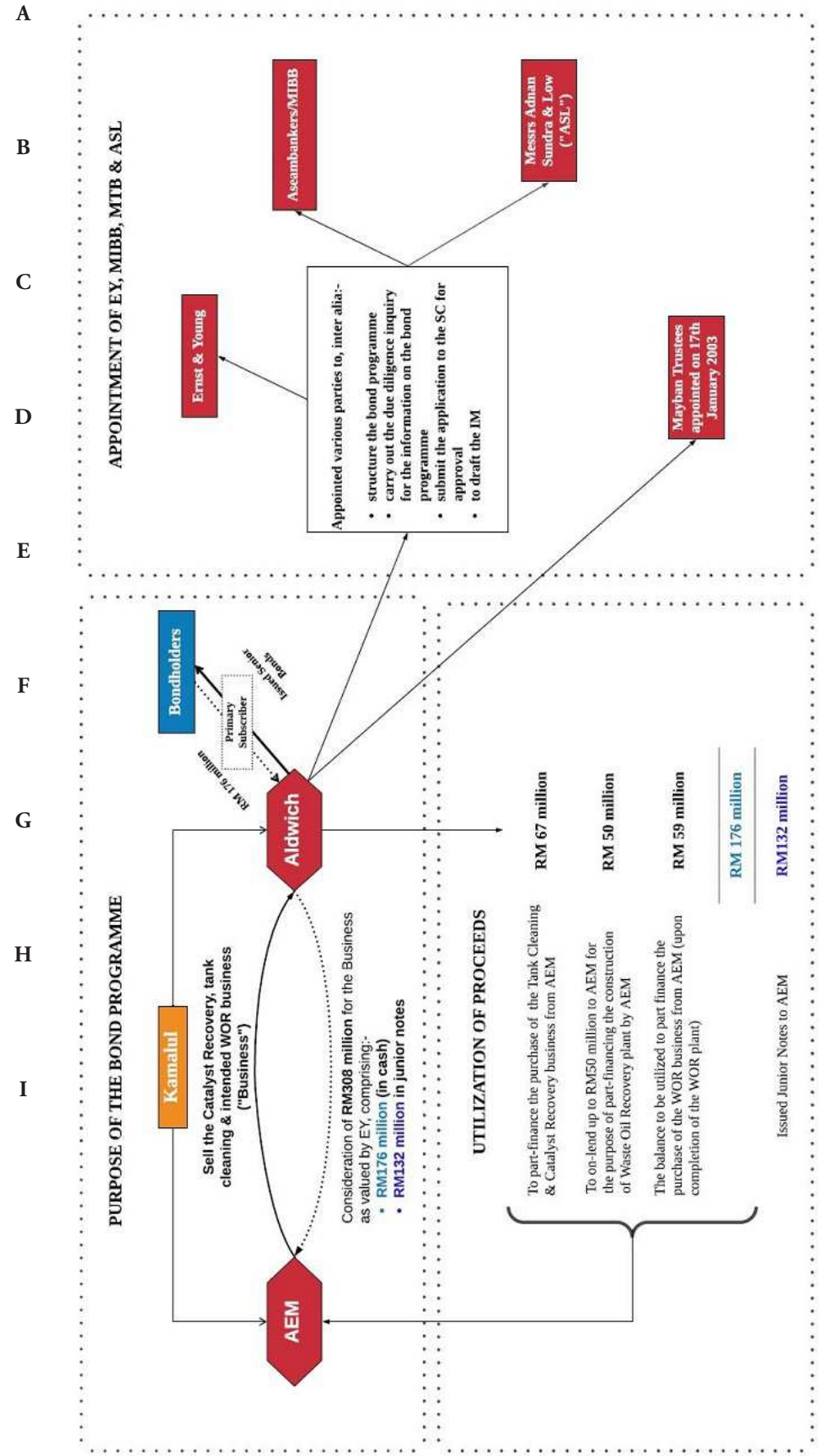
[26] In summary therefore, the Aldwich Bond Programme involved the raising of RM176,883,961 through the issuance of RM293m nominal value zero coupon senior secured serial bonds ('senior bonds'). A further RM131,505 was to be raised for a RM584m nominal value zero coupon junior secured serial notes ('junior notes'). These bonds are exempt bonds.

[27] From the RM176,883,961 obtained from the senior bondholders, about RM67m was to part finance the purchase of the tank cleaning and catalyst recovery business from AEM, while approximately RM50m was to be lent to AEM for part of the financial costs of constructing the WOR plant. The balance was to be utilised to part finance the purchase of the WOR business by Aldwich from AEM once its construction was complete.

[28] Recovery of the financing of the RM176,883,961m was through the senior bonds held by investors, ie the bondholders. The primary source of repayment was expected to be obtained from future cash flows to be generated from Aldwich's business operations. The cash flow projections were therefore of significance.

[29] The Aldwich Bond Programme was designed for a tenure of fifteen years, meaning that Aldwich had to repay the senior and junior bondholders within fifteen years. The bonds were to be redeemed annually on a specified date.

[30] A diagrammatic representation of the bond programme and its purpose (prepared by the solicitors for the first–seventh respondents) is set out below to assist in comprehending the same.


APPOINTMENT OF EY, MIBB, MTB & ASL
Aseambankers/MIBB
Messrs Adnan Sundra & Low ("ASL")
Ernst & Young
Appointed various parties to, inter alia:-
• structure the bond programme
• carry out the due diligence inquiry for the information on the bond programme
• submit the application to the SC for approval
• to draft the IM
Mayban Trustees appointed on 17th January 2003
PURPOSE OF THE BOND PROGRAMME
Bondholders
Issue Senior Bonds
Primary Subscriber
RM 176 million
Aldwich
Kamalul
Sell the Catalyst Recovery, tank cleaning & intended WOR business ("Business")
Consideration of RM308 million for the Business as valued by EY, comprising:-
• RM176 million (in cash)
• RM132 million in junior notes
AEM
UTILIZATION OF PROCEEDS
To part-finance the purchase of the Tank Cleaning & Catalyst Recovery business from AEM
RM 67 million
To on-lend up to RM50 million to AEM for the purpose of part-financing the construction of Waste Oil Recovery plant by AEM
RM 50 million
The balance to be utilized to part finance the purchase of the WOR business from AEM (upon completion of the WOR plant)
RM 59 million
RM 176 million
Issued Junior Notes to AEM
RM132 million

THE STRUCTURE AND DESIGN OF THE ALDWICH BOND PROGRAMME

[31] Given that the principal mode of repayment was through the future business profits of Aldwich, the structure and design of the Aldwich Bond Programme was crafted to ensure that there was structured control and monitoring of all revenue received by Aldwich. This was achieved, inter alia, by a requirement that all funds were collected and utilised through a tiered structure of cascading or 'waterfall' accounts. These designated accounts were prioritised as follows:

(a) revenue account — this account was opened by Aldwich for the purposes of crediting all revenue, sale proceeds, equity contributions and/or advances from shareholders, insurance proceeds and all other amounts of any kind;

(b) construction account — funds required for the construction of the waste oil refinery plant;

(c) construction reserve account;

(d) escrow account;

(e) debt service reserve account ('DSRA'); and

(f) disbursement account.

[32] Of these accounts, the revenue account, the construction account, the construction reserve account, the escrow account and the DSRA were to be operated solely by the security agent, namely MIBB.

[33] Unfortunately however, this safeguard was breached post-issuance of the bonds.

[34] *Aldwich* was only entitled to operate the disbursement account and that too, provided no event of default had occurred or was occurring.

THE DEBT SERVICE RESERVE ACCOUNT ('DSRA')

[35] The DSRA was the account into which monies repayable to the bondholders periodically was deposited. It was therefore of primary significance to the bondholders, as it reflected the ability of the issuer to repay the bondholders as of the requisite maturity dates.

[36] To this end, Aldwich was required to ensure that an amount equal to one-twelfth of the total amount payable by it to redeem the next repayment of the senior bonds as per the payment schedule was deposited there,

commencing from the issue date of the bonds. These monies would then be utilised to redeem the senior bonds.

[37] In this context, Aldwich was required to maintain an actual debt service coverage ratio ('DSCR') of 1.5 times at all times within one year of the issue date of the bonds.

DEFAULT

[38] If Aldwich failed to maintain the requisite 1.5 times ratio, all outstanding senior bonds would be accelerated for repayment to a date prior to the final maturity date based on their redemption value, if so instructed by the senior bondholders.

DISBURSEMENT ACCOUNT

[39] This account was used and operated by Aldwich for the payment of operating expenses as well as capital expenditure. But where would monies to fund this account come from? The security agent, ie MIBB was required to remit on a quarterly basis, specific amounts from the revenue account for such payments. A minimum balance equivalent to two months of the estimated annual budget operational expenses was to be maintained in the disbursement account. In short, it was for the day to day management and operation of Aldwich's businesses.

THE INTENDED STRATEGIC SAFEGUARDS INCORPORATED INTO THE DESIGN OF THE ALDWICH BOND STRUCTURE

[40] The several deliberate safeguards designed to ensure the viability and security of the Aldwich bond included:

(a) the procurement of a valuation report which was acceptable to the lead arranger, MIBB and from an independent valuer estimating as accurate a picture of AEM's businesses, assets and operations as was possible - this would enable a potential investor to assess to some degree of accuracy and reliability the risks attendant with such an investment;

(b) approval from the Securities Commission ('SC') and any other relevant regulatory body;

(c) the setting up of the designated accounts and evidence of receipt of both the notices of assignment and acknowledgement of the same by creditors who had agreed to make payments directly to Aldwich rather than AEM;

(d) evidence from the respective counterparties to the contracts to be assigned from AEM to Aldwich, that notices of such assignment have been served and acknowledgement duly received. This was to be verified by the security agent, MIBB; and

(e) all payments were to be monitored and made only in accordance with the priority cascading tier system described above by MIBB (save for the operations of the disbursement account, which in any event only dealt with limited funds as prescribed under the annual budget provisions).

[41] This then was the scheme and design of the Aldwich Bond Programme that was distributed in the market for enabling potential investors to determine whether or not to invest in these bonds. These representations were relied upon by the plaintiffs. That is evident from the evidence of the various plaintiffs' witnesses, and accepted by the trial judge. Her Ladyship's succinct and precise findings and reasoning accepting their evidence cannot be faulted.

WHO WERE THE PARTIES INVOLVED IN THE STRUCTURING OF THE ALDWICH BOND PROGRAMME?

[42] The structure and design of the Aldwich Bond Programme was undertaken primarily by MIBB, as the lead arranger and adviser. MIBB (then known as Aseam) was licensed to carry out this role by the SC as it possessed the requisite expertise and experience.

[43] MIBB structured the Aldwich Bond Programme premised on input received from AEM acting through Kamalul and its other senior officers in relation to the nature of its existing catalyst recovery and tank cleaning businesses as well as its proposed WOR business.

[44] EY was engaged by AEM specifically amongst other matters, to value its businesses. This task was undertaken by EY based on AEM's business records. Prior to this, EY had been AEM's auditor prior to this bond programme. Premised on this, forecast projections for the WOR business were made.

PRE-BOND ISSUANCE CHRONOLOGY OF EVENTS

The planning memorandum and the due diligence working group (DDWG) — Basis for final information memorandum

[45] All this work, which was to comprise the basis for the IM, was undertaken by way of collaboration between AEM represented by Kamalul and one K Mohan Kumar, MIBB as the lead arranger, EY as the reporting accountant, and the transactional solicitors, Messrs Adnan, Sundra & Low. Although Aldwich had not as yet been incorporated, Kamalul and Mohan

A Kumar were notionally the representatives of Aldwich as well. The collaboration between these various parties took shape in the form of numerous meetings from August 2002 onwards, culminating in the formation of a Due Diligence Working Group ('DDWG') established in October 2002. The representatives stated above became the members of the DDWG.

B

[46] The significance of the DDWG is that:

(a) it outlined the importance of disclosure by AEM through its senior officers, particularly Kamalul; and

C

(b) it provided verification of information by the adviser and lead arranger and the reporting accountant — as emphasised by the sanctions under the SCA 1993.

D **[47]** The DDWG undertook the following work:

(a) the preparation of the planning memorandum which set out the scope of work of each DDWG member in conducting the due diligence prior to submission of the bond programme to the SC;

E (b) the verification report which verified the accuracy of the factual information given and the basis for every forecast, estimate or expression of opinion contained in the IM;

(c) the due diligence report to be produced by the transactional solicitors;

F (d) the submission of the application to the SC for approval of the Aldwich Bond Programme; and

(e) the issuance of the preliminary IM and the IM.

G **[48]** On 4 December 2002, Aldwich was incorporated, its entire shareholding being held by AEM.

[49] Between December 2002 and January 2003, further drafts of the proposed draft IM were prepared.

H

[50] EY commented on and responded to the valuation section in the proposed IM. It also issued its indicative valuation report dated 31 December 2002. The purpose of this report was to determine the purchase consideration for the proposed transfer of businesses from AEM to Aldwich, as well as the intended WOR business to Aldwich. EY computed the indicative value at RM308.7m (lower end) and RM381.5m (upper end). The lower valuation was adopted. This valuation would comprise one of the core bases on which potential investors would decide whether to invest in the bond programme.

I

[51] On 10 January 2003, Aldwich was converted to a public company. A

[52] Between 17 and 22 January 2003, Mayban Trustees was appointed the trustee for the Aldwich bond programme.

[53] On 28 January 2003 EY issued a letter to Aldwich advising that it had reviewed the cash flow forecast and projections prepared by Aldwich and concluded that nothing had come to their attention to doubt the directors' assumptions in computing these projections, and that they therefore provided a reasonable basis on which to ascertain the cash flow forecast and projections. B C

The planning memorandum

[54] The work of the DDWG culminated in a planning memorandum which was updated and circulated to these parties by the transactional solicitors, Messrs Adnan Sundra and Low, in final form on 6 February 2003. The planning memorandum specified that it had been prepared in relation to a proposed due diligence inquiry to be submitted to the SC and other regulatory bodies in respect of, inter alia, the IM for the proposed bond issue. The primary objective of this due diligence exercise was verification of the information set out there so as to ensure complete compliance with the provisions of the SCA 1993. This was emphasised by MIBB at a DDWG meeting held on 29 January 2003. D E

[55] The planning memorandum, running to 45 pages, comprehensively set out the duties and collective responsibilities of the members of the DDWG. It emphasised the consequences of false or misleading statements or omissions, both in criminal and civil law under the provisions of the SCA 1993. F

The standard of care G

[56] The standard of care required of the issuer, the lead arranger and adviser, the reporting accountant and any other persons involved was specified in the planning memorandum as: H

(a) a 'high standard of integrity in business and financial relationships';

(b) 'due skill, care and diligence in providing any service or advice'; and

(c) 'objectivity and independence in all professional and business judgements'. I

[57] The precise duties of each of these professional advisers, pre-bond issuance, were also specified.

[58] The members of the DDWG had access to both the personnel (at all levels) and documentary information of AEM. The latter would include their company documents, bank statements, accounts and business contracts. They were therefore in the unique position to be able to ensure that the necessary structure and security features of the bond programme prior to issuance, were designed and in place, so as to protect investors, while facilitating AEM's business needs.

The significance of the planning memorandum and the DDWG

[59] The significance of the planning memorandum is that it underscores the fact that each of the professional advisers was fully aware of the need for full disclosure and the importance of ensuring that there were no material omissions or misstatements. To this end each of them verified individually the importance of ensuring the accuracy of the information provided to the regulatory bodies and potential investors.

[60] Any contention subsequently that they were unaware of their individual or collective responsibilities therefore became untenable.

Aldwich and AEM

[61] These entities that were represented by Kamalul appear to have fully appreciated the gravity of making full disclosure as evidenced by Aldwich's letter dated 13 February 2003 signed by Kamalul to the SC stating expressly that there was no false or misleading statement or material omission from the information provided. It undertook to ensure continuous compliance with the terms and conditions to be imposed by the SC throughout the validity period of the proposed issue of bonds.

Submission to the SC

[62] Between mid-February 2003 and early March 2003, MIBB submitted the principal terms and conditions of the bond programme to the SC, in the form of a proposal, for its approval.

[63] In mid-March 2003, the issuer, lead arranger and adviser as well as the auditors verified the truth of the information underlying the Aldwich bond programme.

[64] It is pertinent that MIBB did not include the notice, the important notice (which it now relies on, in its substantive defence) to state that it disclaimed responsibility for any statements and information contained in what was eventually to be issued to potential investors, namely the IM.

Conditional approval from the SC

[65] On 4 April 2003, (after requests for further information and re-submission of Aldwich's declaration) the SC gave its approval to the bond programme. It is pertinent that the approval was subject to the following conditions:

(i) You are required to obtain *prior approval for any amendments on the terms and conditions of the issuance of the Aldwich Senior bonds* ...;

(ii) You are required to make a *full and frank disclosure to all prospective investors on all risk in the proposed issuance of the Aldwich Senior Bonds, and the proposed transfer of AEM's business to Aldwich*. (Emphasis added.)

Events transpiring after receipt of conditional approval from the SC

[66] Almost immediately after the SC gave its conditional approval, on 16 April 2003, Permodalan Nasional Bhd sold its entire shareholding in AEM to Kamalul. As a result Kamalul became the holder of the entire shareholding in AEM save for one share directly and through Aldwich Industries Sdn Bhd ('AISB') where he holds a 99.5% shareholding. Kamalul therefore effectively owned and controlled AEM and thereby Aldwich.

Execution of the business sale agreements (BSAs)

[67] On 13 May 2003, AEM and Aldwich executed the two business sale agreements (BSAs), namely business sale agreement BSA 1 and BSA 2 (as outlined above in para 23(a) & (b)) to sell and transfer AEM's businesses to Aldwich. Supplemental agreements were entered into on 7 August 2003 to vary the terms of BSA 1 and 2 ('the supplemental BSAs')). The supplemental agreements were the solution proposed by MIBB's solicitors, as explained in paras 102–103 below.

[68] Clause 2.4 of the second supplemental agreement to BSA 1 inserted a new cl 13.4 into BSA 1. The new clause pertained to the arrangement for contracts that have not been novated to Aldwich by the completion date. For as long as such contracts have not been novated, beginning from the completion date, AEM would hold its benefits, rights, interest and title in and under the contracts on trust for and on behalf of Aldwich, Aldwich's successors in title to the business, and Aldwich's nominees. From the completion date, AEM would cease to have any beneficial interest in the contracts which have not been novated as at that date. AEM further undertook to receive all contract proceeds payable under such contracts and to hold the same in trust for Aldwich, and was to immediately pay the contract proceeds into the revenue account.

Execution of the bond contracts

[69] On 22 May 2003 the bond contracts were executed. This comprised:

(a) the trust deed between Aldwich and Mayban Trustees;

(b) the securities agency agreement between Aldwich, AEM, MIBB and Mayban Trustees — which afforded both MIBB and Mayban Trustees powers and obligations. Mayban Trustees had extensive powers as did MIBB as they held powers of attorney for both Aldwich and AEM. Either or both could theoretically, have stepped into AEM or Aldwich's shoes for the purposes of communicating with either AEM or Aldwich's contract counterparties to secure all business proceeds;

(c) the assignment and charge by Aldwich in favour of MIBB — under this agreement MIBB was to ensure that Aldwich issued the requisite notices of assignment to its contract counterparties in respect of its businesses and to ensure those counterparties delivered to MIBB the respective acknowledgements agreeing to pay all contract proceeds due to Aldwich directly into the revenue account. MIBB therefore undertook a ring-fencing obligation under this agreement;

(d) the calculation agency agreement between Aldwich, MIBB and Mayban Trustees; and

(e) the subscription agreement between Aldwich and MIBB in its capacity as lead arranger and MIBB in its capacity as primary subscriber. MIBB therefore undertook two separate roles.

[70] It is notable that the bondholders who remained a fluctuating class of investors had no recourse to, nor sight of these agreements. They are not signatories to these agreements. The trustee, ie Mayban Trustees and security agent, MIBB executed these agreements for the benefit of the bondholders.

Charging of the designated accounts

[71] On 23 June 2003, Aldwich served a notice of assignment on MIBB charging the six designated accounts and all amounts standing to their credit to MIBB. As such, all contract proceeds received to the account of Aldwich for its business operations would be assigned directly to MIBB vide payment directly to the revenue account.

[72] Between 24 and 26 June 2003 HSBC Bank USA London and Aldwich executed:

(a) an international bullion master agreement for bullion trade; and

(b) an unallocated bullion accounts agreement.

Non-assignment of HSBC bullion agreements

[73] On 3 November 2000, AEM and HSBC Bank USA entered into an international bullion master agreement ('AEM bullion agreement'), which governed all bullion transactions between HSBC Bank USA and AEM.

[74] On 24 June 2003, Aldwich entered into an international bullion master agreement with HSBC Bank USA ('Aldwich bullion agreement') on the same terms as the AEM Bullion agreement.

[75] The Aldwich bullion agreement contained a non-assignment clause.

[76] On 26 June 2003, Aldwich and HSBC Bank USA entered into an unallocated bullion accounts agreement ('unallocated bullion agreement') whereby HSBC Bank USA agreed to open and maintain for Aldwich an unallocated account for the deposit of precious metals. This agreement similarly contains a non-assignment clause.

[77] By notice of assignment dated 18 July 2003, Aldwich notified HSBC Bank USA of the assignment of the unallocated bullion agreement to MIBB and requested that all payments due to Aldwich under the said agreement be made into the revenue account. Similar notices of assignment were also issued by Aldwich to Mayban Trustees and Petronas Dagangan respectively, as required by the Aldwich Bond Programme.

[78] None of the notices were acknowledged or consented to by the counterparties, or returned to Aldwich.

[79] It is not denied that AEM's bullion agreements dated 3 November 2000 and 6 November 2001 contained a non-assignable clause. Similarly, the Aldwich bullion agreement dated 24 June 2003 and the unallocated bullion agreement dated 26 June 2003 contained non-assignable clauses.

[80] Since the unallocated bullion accounts agreement contained a non-assignment clause, this meant that proceeds from these agreements could not be assigned directly for payment into the revenue account. It is not evident that any steps were taken to resolve this position.

[81] However there was no disclosure by MIBB and the other four members of DDWG (of the fact that these bullion agreements were not assigned in satisfaction of CP20 (condition precedent No 20 in Schedule 1 of the subscription agreement) or that they were incapable of being assigned) in the IM, despite being a fact known prior to the issuance of the bonds.

[82] It is pertinent there is absence of 'ring-fencing' (security) over the proceeds under both these bullion agreements. The reason being the trust arrangement contemplated by the BSAs and/or supplemental BSAs only cover agreements entered into by AEM and its counterparties, not agreements entered into by Aldwich such as the Aldwich bullion agreement and the unallocated bullion agreement.

[83] It is critical that the failure to novate and assign the Aldwich bullion agreement and the unallocated bullion agreement be set out in the IM. Failure to do so amounts to a material omission.

AEM's monies account with HSBC Bank USA, London

[84] Kamalul nominated an account in HSBC Bank USA, London to accept payment when AEM was to be paid for platinum.

[85] Kamalul agreed that upon the sale of the precious metals in London, the proceeds of sale would first be credited into AEM's money account with HSBC Bank USA in London, before being remitted to AEM's account in Kuala Lumpur.

[86] Kamalul then changed his stance. He claimed that AEM only had a metal (bullion) account in HSBC Bank USA.

[87] Aldwich, AEM and Kamalul claimed that the dealings AEM has with HSBC Bank was in metal and not in cash.

[88] This claim is not ture, given that the international master bullion agreement between Aldwich and HSBC Bank USA clearly contemplates dealings between the parties either in the form of metal or cash.

[89] Saraswathy (DW4), although maintaining that AEM only had a metals account with HSBC Bank USA, conceded that 'payments' in Aldwich's notice of assignment to HSBC dated 18 July 2003 referred to monies.

[90] Aldwich, AEM and Kamalul relied on the evidence of Mary Ng, deputy branch manager of Mayban Banking, Pudu Branch that HSBC Bank USA was the 'remitter' which remitted the monies to AEM or Aldwich's account, and contended that this is evidence that they had no such monies account.

[91] Mary Ng's evidence has to be viewed in context, namely:

(a) Mary Ng has no personal knowledge of AEM or Aldwich's account with HSBC Bank USA; and

(b) in answering the question posed by the plaintiffs' counsel, she was merely testifying on a particular remittance of the 'missing' RM23m in Aldwich's Maybank Cash Management System.

[92] The High Court agreed with the plaintiffs' submission that AEM's HSBC Bank USA in London remitted foreign money to AEM's Maybank Account in Kuala Lumpur, ie US Dollars. Those sums of monies would only be converted into Ringgit by the receiving bank in Malaysia. Thus, Kamalul's second version that AEM only had a metals account in London is not true because monies realised from the sale of precious metal, in US Dollars, would first have to be credited into a monies account with HSBC Bank USA London, before it was remitted into AEM's Maybank Account in Kuala Lumpur.

[93] Despite all the discovery orders made by court, AEM and Aldwich failed to produce any documents/statements to show how much proceeds were realised from the sale of precious metals. Since AEM and Kamalul have failed to account for all the proceeds from the CR business, the High Court invoked s 114(g) of the Evidence Act 1950 ('the EA') against Aldwich and AEM, ie, these documents if produced would draw an unfavourable inference against Aldwich and AEM.

Novation of AEM contracts to Aldwich and assignment of Aldwich's contract proceeds to MIBB vide the revenue account required to be undertaken as a condition precedent ('CP') to the issuance of the bonds

[94] On 18 July 2003 Aldwich issued its notices of assignment to its sixteen business contracts counterparties. This notice required the counterparties to consent to the assignment and to pay all proceeds into the revenue account.

[95] In point of fact this key safeguard required firstly that AEM novate all its business contracts such that Aldwich stepped into its shoes. The contracts would then be assigned to MIBB so as to ensure that all proceeds would be paid directly into the revenue account which was within MIBB's control. Neither AEM nor Aldwich had access to the revenue account.

[96] It will be recalled that this comprised a key requirement to ensure the sanctity of the bond programme. Such a safeguard was embodied in a condition precedent (CP) to the subscription agreement and separately a CP of the IM.

Inability and/or failure to novate business agreements and assign contract proceeds

[97] However on 4 August 2003 Aldwich advised MIBB that out of the sixteen business contract counterparties, only one contract could be assigned

with the consent of the counterparty. This meant that a key ring-fencing or security arrangement could not be achieved.

[98] MIBB sought the advice of its solicitors as to:

(a) the legality of the assignment of contracts that had not as yet been novated by AEM to Aldwich; and

(b) whether it was necessary to obtain the consent of the counterparties to the assignment.

[99] On 5 August 2003 MIBB's solicitors advised that:

(a) the notices of assignment from Aldwich to MIBB in respect of AEM's business contracts could only be issued by Aldwich after novation of those contracts had been effected; and

(b) that the assignments by Aldwich to the security agent, MIBB, were valid in law provided that the relevant acknowledgements by the counterparties to the novation had been issued by AEM and Aldwich, and that such acknowledgements took effect prior to the notices of assignment.

[100] In other words, MIBB's solicitors advised that notwithstanding that no consent to the novation had been received by the counterparties, the issuance of acknowledgements by AEM and Aldwich sufficed to ensure compliance with the CP.

[101] On 7 August 2003, a further meeting was held between MIBB's legal advisers, MIBB, and the transactional solicitors where it was noted that the business contracts entered into between AEM and its business partners had not been novated to Aldwich as agreed under the BSA 1 and BSA 2. Despite AEM and Aldwich having issued the requisite acknowledgements of such novation to their counterparties most had failed to respond, meaning that novation had not been effected.

Resolution of the problem

[102] MIBB's solicitors then formulated what they termed a solution to this issue. It was important that the issue be resolved, as it comprised a CP to the subscription agreement. The solution devised by MIBB's solicitors was as follows:

(a) as the business agreements had not been novated proceeds would continue to come into AEM's hands. AEM would contract as of and subsequent to the business sale agreement dates to hold all rights title and interest in the contract proceeds in trust for Aldwich;

(b) all such contract proceeds would be paid by AEM directly into the revenue account opened and maintained by Aldwich. (In the meantime AEM would continue to strive to procure the requisite acknowledgements from its counter parties in order to novate those contracts);

(c) the BSA 1 and BSA 2 would be varied to incorporate the terms of this proposal vide supplemental agreements to be executed by AEM and Aldwich; and

(d) MIBB was advised that this would not result in a variation to the security arrangements in that the assignment and charge would nonetheless still provide MIBB as security agent with an assignment from Aldwich (not the counterparties) over all its rights to the contract proceeds through AEM.

[103] Accordingly on 18 July 2003 the supplemental agreement to BSA 1 was executed. And on 7 August 2003 the second supplemental agreement to BSA 1 was executed.

The effect of the implementation of the 'resolution' proposed and agreed upon

[104] It is apparent from the foregoing that:

(a) there was a contravention of the BSA 1 and BSA 2, to the knowledge of AEM, Aldwich and MIBB;

(b) no novation of the business contracts of AEM in favour of Aldwich would ensue by reason of the failure of the counterparties to formally give their consent to such a novation whereby Aldwich would step into the shoes of AEM:

(c) no assignment of the contract proceeds from the counterparties to the business contracts directly to the revenue account under the control of the security agent, MIBB;

(d) both the foregoing legal formalities comprised a CP to the subscription agreement as well as the IM;

(e) the original structure of the Aldwich bond scheme sought to ensure that repayment would be guaranteed, by reason of the fact that all contract proceeds from Aldwich's business would be remitted directly to the revenue account, thereby outside the reach of either AEM or Aldwich;

(f) however the failure to effect two crucial steps in this scheme, namely the novation of the business contracts from AEM to Aldwich, as well as the assignment of monies directly from the counterparties to the business

contracts into an account controlled by the security agent, MIBB, meant that the primary safeguards envisaged to be put in place pre-bond issuance, proved abortive;

(g) tnstead a substantive variation to the original bond structure was eventually implemented as advised, namely that AEM which would remain the recipient of all business contract proceeds, would hold those monies on trust for Aldwich, and pay those contract proceeds directly into the revenue account;

(h) the failure to effect a novation of the business contracts meant that Aldwich never acquired AEM's business contracts. As such, it had no right, title or interest in those business contracts. This undermines the basic objective of the BSAs and more significantly provided no security for the financiers, who eventually became the senior bondholders;

(i) the failure to effect an assignment of the contract proceeds from the counterparties directly into the revenue account in turn, meant that access was accorded to AEM, and thereby Kamalul, of the entirety of all contract proceeds received from the business operations of Aldwich. The fact that those contract proceeds were held on trust for Aldwich by AEM, provided no security or safeguard from AEM diverting those funds. Those contract proceeds were the sole means of repaying the prospective investors who became the senior bondholders;

(j) it is clear that the failure to adhere to these two fundamental aspects of the BSAs, which comprised moreover, a CP both in the subscription agreement and the IM, amounted to a substantial variation in the structure of the Aldwich bond programme;

(k) notwithstanding this, no disclosure was made at any stage to the SC. That too, despite the clear terms of the conditional approval given by the SC. It will be recalled that the conditions were, inter alia, that: (i) the SC approve any amendments to the terms and conditions of issuance of the senior bonds and the junior notes; and that (ii) full disclosure be made to all prospective investors about all risks arising from the issuance of these bonds as well as the transfer of AEM's business to Aldwich. Clearly this variation required disclosure to the SC as well as potential investors; and

(l) MIBB as the lead arranger and security agent was therefore aware, well before the issuance of the bonds, as of 7 August 2003, that there was a significant weakening, if not collapse, of the safeguards in the structure of the Aldwich bonds, but chose not to make any disclosure. There was effectively no ring-fencing of the contract proceeds which comprised the primary source of repayment to the potential investors as of this date.

[105] On 12 August 2003 the final IM was circulated to the members of the DDWG together with proposed verification notes. For clarity, this final version did not contain the variations that had been effected pursuant to the 7 August 2003 meeting above.

The information memorandum (IM)

[106] On 12 or 13 of August 2003, the IM, which ran to some one hundred pages, was circulated to potential investors. Under the SCA 1993, the IM is required to be lodged with the SC. Under s 38 of the SCA 1993, it carries the status, in law, of a prospectus.

[107] The IM is a significant document because it sets out the principal terms of the Aldwich bond structure. Potential investors do not have sight of the bond contracts, only the IM. To that extent, it is the primary document relied upon by an investor to:

(a) comprehend the structure of the bonds;

(b) assess the present and future prospects of the business of the issuer;

(c) as Aldwich, the issuer, was a non-listed company, there was very little public information available. The IM filled this void; and

(d) the statements in the IM are relied upon as being truthful and complete by potential investors of the bonds, for the purposes of assessing risk and investment.

The key information in the IM

[108] The IM provided the following verified statements and information to potential investors:

(a) the BSA 1 and BSA 2 as originally envisaged.

It did not disclose the fact that novation could not be effected between AEM and Aldwich and that accordingly contract proceeds from business counterparties could not be paid directly into the revenue account within the control of the security agent, MIBB (see Chapter 8 of the IM. It only stated in relation to BSA 1 'As at the date of this Information Memorandum, BSA 1 has become unconditional and the parties have set 18 July 2003 as the date of transfer of the businesses and the contracts are in the process of being novated'. In relation to BSA 2, Chapter 8 of the IM states 'As at the date of this Information Memorandum, to the extent that the conditions precedent in BSA 2 must be met prior to the Issue Date, such conditions precedent have been fulfilled under the terms therein contained'. It is noted that the IM is dated 12 August 2003 but at that date, the supplemental agreements had been executed to vary

BSA 1 (ie on 18 July 2003 and on 7 August 2003). Therefore the above statement in Chapter 8 of the IM is clearly false and misleading (the definitions will be discussed further in these grounds);

(b) on the contrary, it set out the Aldwich bond structure as comprising the novation of business contracts from AEM to Aldwich;

(c) the assignment of business contracts and the contract proceeds from Aldwich to MIBB;

(d) the existence of CP20 namely that all business contracts were to be assigned by Aldwich to Aseam prior to bond issuance. And that notices of assignment duly acknowledged by the counterparties agreeing to the assignment to make such payments directly to the revenue account, were to be in place prior to issuance of the bonds; and

(e) the existence of the six designated accounts, all of which were to be operated by MIBB; the confirmation that all payments received in the revenue account were payable in the strict order of priority as prescribed, which would ensure that there were sufficient funds in the DSRA to meet the requisite repayments due on maturity date.

Lodgement of the IM

[109] On 14 August 2003, one day prior to the issuance of the Aldwich bonds, MIBB wrote to the SC confirming that there had been no changes to the terms and conditions approved by the SC per its letter dated 4 April 2003. The issue of whether this amounted to a clear misstatement was answered in the affirmative by the trial judge and is one of the primary issues for consideration in the appeal by MIBB.

[110] In essence the issue is whether the omission by MIBB to set out the variations to the initial arrangements under the BSAs in the IM, coupled with the effective removal of the ring-fencing safeguards, warranted the finding by the learned trial judge that MIBB had breached its statutory duties as well as in contract and in negligence. This turns upon whether the changes made to the original BSAs vide the supplemental agreements amounted to a material variation and the consequential effects on the structure and design of the Aldwich Bond Programme. This will be considered in the course of the judgment dealing with MIBB's appeal.

[111] In any event, MIBB proceeded to lodge the IM with the SC.

Witnesses — Effect of the changes on their assessment of the investment

[112] Various witnesses from the bondholders explained the implications of these material omissions on the bondholders' assessment of whether to invest in the Aldwich bonds. They testified variously that reliance had been placed on:

(a) the ring-fencing structure; and

(b) the priority of payments safeguards as designed by the cascading waterfall payment structure.

[113] The learned judge accepted their testimony and relied on the same. It would appear from a perusal of the records and the foregoing factual scenario, with respect, that Her Ladyship was correct in her findings.

[114] This brings the chronology of events during the pre-bond issuance period to a close. It is evident that there were serious contraventions, misstatements and omissions even before the issuance of the Aldwich bonds, ie during the pre-bond issuance period.

ISSUANCE AND RELEASE OF THE ALDWICH BONDS IN THE BOND MARKET

[115] On 15 August 2003 the Aldwich bonds were issued and released in the secondary market on various dates.

[116] The bondholders, amongst others subscribed to the Aldwich bonds, relying on the statements and information set out in the IM. As stated above, this is evidenced by the testimony of the various representatives from the bondholders.

[117] In this context it is pertinent that MIBB was the primary subscriber for the Aldwich bonds. In its capacity as lead arranger and security agent, it knew of the non-compliance with fundamental CPs. However the extent of MIBB's knowledge as primary subscriber is not clear, as no witness testified at trial as to why or how it chose to invest in the bond, despite the removal of primary safeguards.

POST-BOND ISSUANCE CHRONOLOGY OF EVENTS

The consequences of the failure of the ring-fencing provisions during the pre-bond issuance period

[118] As a consequence of the breaches of the ring-fencing provisions and structure during pre-bond issuance period, the cash flow records, both from counterparties as well as from AEM to Aldwich and vice-versa showed a complete failure to capture or remit large sums of monies due to the revenue

account as envisaged under the original Aldwich bond structure, and even under the varied structure vide the supplemental agreements to the BSAs. It would appear that these substantive diversions of monies were not monitored, regulated or remedied.

Monies from counterparties to disbursement account controlled by Aldwich

[119] Between March 2005 and 30 September 2009 a sum of RM83,027,554.88 was remitted on 25 separate occasions from HSBC Bank USA, London to Aldwich's disbursement account. The latter was controlled solely by Aldwich. These monies did not go to the revenue account as originally envisaged or even as sought to be achieved under the variation whereby AEM would hold those monies on trust for Aldwich and remit the same to the revenue account.

Monies paid to AEM not remitted to revenue account

[120] Between mid-July 2006 to October 2009 several other business counterparties made 13 separate payments totalling RM1,026,835.02 directly to AEM. There is no evidence showing that those monies were transferred as undertaken by AEM to the revenue account controlled by the security agent MIBB.

Monies diverted from Aldwich's disbursement account to AEM's account

[121] Between 31 March 2008 and 23 October 2009 Aldwich remitted a total of RM166,941,504 on 32 separate occasions from its disbursement account to AEM's Maybank account. This shows a complete failure of the ring-fencing structure, not to mention a failure to monitor both the disbursement and revenue accounts.

Monies diverted from Aldwich's disbursement account to Kamalul

[122] Between 26 October 2006 to 18 June 2009 a sum of RM16,700,014 was paid out from Aldwich's disbursement account to Kamalul on seven separate occasions. This clear breach of the BSAs as varied by the supplemental agreements was not monitored nor remedied. Kamalul claimed that these were repayments of loans extended by him to Aldwich.

AEM remitted contract proceeds to disbursement account controlled by Aldwich not to revenue account

[123] Between 31 March 2008 and 23 October 2009 AEM only remitted RM18,100,002 to Aldwich's disbursement account and not into the revenue account as required under the supplemental BSAs.

No detection, monitoring nor regulation of irregularities — DSCR and audited financial statements

[124] In the interim between 2004 and 2008, none of these dissipation of funds in various forms was noticed, monitored or regulated. On the contrary the projected DSCRs (both actual and projected) were at healthy figures (1.5 times was the minimum required ratio) ranging from 5.54 times in 2004 to 5.81 in 2005, 2.29 in 2006, 2.24 in 2007 to 2.08 in 2008 for actual DSCR.

[125] The audited financial statements also disclosed no irregularities. Revenue was healthy from 2004 to June 2008 when revenue was recorded as the highest ever received at RM224,792,135.

[126] The Aldwich bonds went into default some five years after issuance (well before the tenure of 15 years) in August 2009 and eventually failed, with the bondholders declaring an event of default in February 2010.

Events leading to discovery of irregularities and dissipation of monies due to the revenue account

[127] However in mid-September 2008 EY's internal control and fraud considerations noted several fraud risks. EY conducted a substantive audit on Aldwich in December 2008.

[128] On 23 December 2008 MIBB wrote to Aldwich seeking clarification as to why only RM16,166,667 in cash flow proceeds was credited into revenue compared to the revenue of RM94,476,112 as reported in Aldwich's audited financial statement for the year ending 2007. This is a difference of about RM78m.

[129] Aldwich advised that only 15 per cent of cash flow proceeds was gross profit credited into the revenue account. MIBB was not satisfied with the explanation pointing out that all revenue and income had to be paid into the revenue account.

[130] At the same time, MIBB sought a list of business contracts novated to Aldwich by AEM and acknowledgement from the counterparties evidencing their consent to both novation and assignment of contract proceeds to the revenue account in favour of MIBB.

[131] Aldwich only produced the requisite novation and assignments for four counterparties.

[132] In June 2009 MIBB wrote to Aldwich querying the balance in the revenue account which stood at only RM52 thousand odd which it stated did not reflect the expected cashflow proceeds. There was no tenable response from Aldwich.

[133] On 13 August 2009 Aldwich failed to make the payment due under the DSRA amounting to RM1,666,700. This amounted to a trigger event for default. This occurred only two months after certification of the minimum DCSR ratio by EY. A month later, on 13 September 2009 Aldwich failed to pay the second DSRA instalment of RM1,666,700 such that the total now due and owing was RM3,333,400. Mayban Trustee wrote to Aldwich instructing it to rectify the trigger event.

[134] The trustee notified the SC of Aldwich's default.

[135] On 12 January 2010 the bondholders declared a trigger event had occurred as a result of Aldwich's failure to pay the monthly DSRA payments under the assignment and charge contract. Consequently all sums payable under the bonds became due on the following legal final maturity date (as defined), namely on 15 August 2012.

[136] As Aldwich failed to remedy the default, the bondholders declared an event of default on 18 February 2010. A redemption value sum of RM242,432,497.16 became immediately due and payable. Aldwich in its responses admitted that it was in breach of the terms and conditions of the trust deed and that not all revenue was being credited into the revenue account but was being remitted into the disbursement account. It also conceded that there had not been compliance with the requirement to deliver acknowledgements and endorsements on letters of novation and notices of assignments between the period from 2004–2008.

[137] In March 2010 receivers and managers were appointed over the operations and assets of Aldwich and AEM. Aldwich bonds were downgraded from their initial rating of triple A to Class D. To understand the import of this, we need to backtrack to the start of the ratings of the Aldwich bonds.

Bond ratings by the Rating Agency Malaysia Bhd ('RAM')

[138] In May 2003, Rating Agency Malaysia Bhd ('RAM') issued its pre-sale report on the proposed issuance of the Aldwich bonds. This was the first time information on the bonds was released to the public.

[139] The RAM structured finance rating dated July 2003 assigned ratings of AAA, AA2, B2 and C3 to the Class A and Class B Bonds and the Class C and Class D Notes respectively. This was reiterated in the RAM structured finance rating dated August 2003. RAM's review aating dated September 2004 reaffirmed these ratings of Aldwich bonds.

[140] RAM reported in November 2005 that the WOR plant was not performing to initial expectations due to teething problems in the first few months. As a result, the WOR plant was shut down for three months for process enhancements. A fire broke out in August 2005 at a segment of the WOR plant, which caused it to be temporarily closed down. The WOR plant was not operational for eight months in 2005 and only recommenced operations in mid-January 2005.

[141] RAM's transactional performance update of May 2006 placed the Aldwich bonds on a ratings watch with a negative outlook due to the continued underperformance of the WOR, which prompted RAM to revise expectations of the underlying business risks and its accompanying cash flows.

[142] On 26 June 2006, RAM downgraded Aldwich's Class A and B senior bonds from AAA and AA2 to AA2 and A1 respectively, with a negative outlook.

[143] RAM's rating update issued in July 2006 explained RAM's concerns about the business risk, particularly the continued underperformance of the WOR business which has affected its risk profile.

[144] On 18 February 2008, RAM further downgraded Aldwich's Class A and B senior bonds from AA2 and A1 to A1 and A3 respectively, with a negative outlook due to Aldwich's persistent difficulty in obtaining waste-oil supply and uncertain tank cleaning opportunities.

[145] By letter dated 4 November 2009, RAM wrote to Aldwich stating that it had not received all the information it had requested, and if it did not receive the said information by 5.30pm as of 5 November 2009, RAM would suspend the Aldwich bond ratings.

[146] On 11 November 2009, RAM publically announced its intention to suspend the Aldwich bonds' rating.

[147] On 11 March 2010, RAM downgraded the rating of the Aldwich bonds and notes to Class D.

What turns on the RAM ratings?

[148] The High Court found that despite the teething problems of the WOR plant, RAM's rating of the senior and junior bonds was reaffirmed and there was no evidence that the subsequent downgrade in rating of the senior bonds was due to the teething problems.

[149] The High Court rejected the contention of Aseam and Mayban Trustees that the bondholders placed little reliance on the IM or preliminary IM as the decision to purchase the Aldwich bonds was primarily motivated by the strong AAA rating assigned to the senior bonds by RAM and the cash flow projections. The High Court held:

(a) although the AAA rating assigned to the senior bonds by RAM was a consideration to the bondholders when purchasing the Aldwich bonds, it was not the only consideration. Nothing turns on the bondholders' reliance on the RAM ratings;

(b) the AAA rating by RAM can only be attributed to the tight and strong structural features of the bond as described in the terms of the IM; and

(c) the cash flow projections were one of the critical factors taken into account by the bondholders in their credit evaluation of the Aldwich bonds. Nothing turns on such reliance given that the cash flow projections itself formed part of the IM.

The present suit

[150] To continue the narrative, to recover losses the WOR plant was sold by the receivers and managers for RM21,089,505.45.

[151] As this was insufficient to cover the losses suffered by the bondholders, the present suit was initiated in November 2012.

PART II

The law under the SCA 1993 relating to the issuance and regulation of bonds

[152] The bondholders have relied upon several statutory provisions under the SCA 1993 to formulate a cause of action against each of the various parties ie the appellants. The primary statutory provisions relied upon by the bondholders ss 38, 57, 32B, and 153 of the SCA 1993 (now replaced by ss 214, 229, 248, 273, 276 and 357 of the CMSA 2007).

[153] As the breach of these statutory provisions comprises one of the principal causes of action against each of the parties, it is important that the law pertaining to the SCA 1993 (and now the CMSA 2007) is fully detailed and appreciated.

[154] The bulwark underlying the SCA 1993 and now the CMSA 2007 is the adequate, accurate and timely disclosure of information. This requirement is prevalent in all jurisdictions in order to ensure that capital markets operate fairly and efficiently. It is essential for market confidence and the proper functioning of the markets in an economy.

[155] Disclosure is necessary as the prospective issuer and its agents or advisers possess information that is not available to the prospective investors. The underlying rationale is to bridge this gap in terms of knowledge, such that investors have access to all material information. They are then in a position to make an informed decision. Such disclosure is not intended to insure investors against the risks inherent in any investment. It exists to ensure that the requisite material information is made available to potential investors, and that such material information is true and accurate, not only at the time of its issuance but throughout the tenure of the security. In the instant case that would encompass the period from the invitation, offer and issuance of the Aldwich bonds, as well as post-bond issuance.

[156] Specific provisions of the SCA 1993, that are of direct relevance to the instant case are considered next, as these provisions are relevant to comprehend the basis of civil recovery for loss and damage suffered by potential investors under statute. Many of the provisions of the now repealed SCA 1993 find their origin in the Corporations Act 1989 of Australia which was repealed there in 2001. A comparison of the provisions shows a close similarity.

Exempt issue and categories of investors

[157] The Aldwich bonds that were offered, issued and subscribed for by, inter alia, the bondholders comprised an excluded offer, invitation and excluded issue respectively. As such, the offer and invitation of Aldwich bonds for subscription did not require the issuance of a *prospectus* (see Division 3 s 5 of the SCA 1993 that defines an 'excluded invitation' or 'excluded offer' to mean an invitation or offer specified in Schedule 2 or which is prescribed by the Minister to be an excluded invitation or excluded offer under para 38(1)(b)).

[158] Schedule 2 defines excluded offers or invitations to which ss 41–50 and 52–53, namely the statutory provisions relating to prospectuses in Division 3 of Part IV of the SCA, do not apply.

[159] Consequently, an issue of securities is an excluded issue under s 39 of the SCA 1993 if it is specified in Schedule 3. Schedule 3 in turn lists out categories or lists of investors who are commonly referred to as 'sophisticated investors'. Schedule 3 does not include 'retail investors'. In other words, the Aldwich bonds were not available to retail investors.

[160] Exempt issue bonds are not available to retail investors as the underlying policy is that complex and risky market investment products should only be available to parties that are in a position to comprehend and analyse such instruments before making a decision to invest in the same. This category of investors are the 'sophisticated investors' listed in Schedule 3. They are deemed to have knowledge of, and the requisite financial ability and expertise, to comprehend the product or bond which they choose to invest in. They do not therefore require extensive explanation about the product, as would be the case with ordinary retail investors.

[161] Instead, exempt offers invitations and issues require that the issuer submit and issue an IM describing the business and affairs of the entity making the invitation, offer or issue, ie Aldwich. In the instant case, as set out earlier, the IM was prepared by MIBB premised on information from Aldwich, AEM and Kamalul assisted by EY. Essentially the IM set out in comprehensive detail the business and affairs of Aldwich and AEM and the proposed expansion of its businesses, for which it required financing. This is the document used by the lead arranger, here MIBB, to market the bonds to potential investors.

[162] While extensive explanation about the nature of the product may not be required for the categories of investors in Schedule 3 of the SCA 1993 (now Part 1 of Schedule 6 and Part 1 of Schedule 7 of the CMSA 2007) or the 'sophisticated investors', there is still an underlying need for such investors to be apprised of the nature and fundamentals of the business they may choose to invest in. Any analysis of the viability of such an exempt issue, such as the Aldwich bonds, requires all material information about Aldwich and its affairs as well as the proposed investment structure, without omission to be disclosed in the IM. More significantly, such information must be true and accurate.

[163] The need for full disclosure is the bedrock of the securities market and its legislation. This need for full and accurate disclosure in relation to information about an exempt invitation or offer is statutorily provided for in s 38(3) of the SCA 1993. It provides that an IM issued by a person or his agent purporting to describe the business and affairs of the person (ie Aldwich) in respect of an excluded offer or invitation is deemed to be a prospectus in so far as it relates to the liability of the person or his agent for any statement or information that is false or misleading or from which there is a material omission.

[164] An academic paper by Charles Qu (see *The Fiduciary Role of the Manager and the Agent in a Loan Syndicate* by Charles Qu, Associate Lecturer at the Faculty of Law, Griffith University, published in the *Bond Law Review*, Vol 12, Issue 1, Article 7 2000) takes the view that not all participants in a scheme would be sophisticated big banks, so participants can be vulnerable vis a vis the agent bank in terms of sophistication and financial strength. He goes on to add that even presumably sophisticated participants can be in a vulnerable position, because due to the close relationship between the manager/agent bank and the borrower, the agent has easier access to the borrower's information. This puts the agent at what he terms an 'informational advantage' which is susceptible to abuse. We are of the view that here, MIBB had an informational advantage over the bondholders because of its 'hat' as the lead arranger and being a member of the DDWG.

[165] A similar provision relates to an exempt issue under s 39(3), which again, in relation to the IM, deems the same to be equivalent to a prospectus in relation to any false, misleading or material omission. This duty of full disclosure remains a continuing duty, such that material changes made subsequently to previously disclosed information must be reported to the SC.

[166] In summary, there is therefore, no distinction made under the SCA 1993 (and now the CMSA 2007) between a retail investor and sophisticated investor in relation to the need to provide true and accurate information about the business and affairs and other material facts and circumstances about the person making the invitation, offer and issue and the structure and workings of the proposed exempt security. This is the full purport of ss 38(3) and 39(3) which equate an IM with a prospectus for purposes of stipulating the need for disclosure in relation to specific information relating to the issuer and the product.

Penalties under the SCA 1993 for a failure to comply with disclosure requirements

[167] Section 57 of the SCA 1993 provides for the right of an investor to recover for loss or damage resulting from false or misleading statement/s in a prospectus, etc. By virtue of ss 38(3) and 39(3) this would include persons making statements in an IM in relation to the business and affairs of the issuer or any omission in relation to such issue.

[168] More specifically, s 57 provides that a person who subscribes for, and suffers loss or damage, as a result of any statement or information contained in a prospectus (the IM for the present purposes), that is false or misleading, or in respect of which there is a material omission may recover such loss or damage from, inter alia, the following persons:

(a) under s 57(a) the issuer and each director of the issuer at the time of the issue of the prospectus;

(b) under s 57(d) a principal adviser;

(c) under s 57(e), a person named in the prospectus with his consent as having made a statement that is included in the prospectus or on which a statement made in the prospectus is based, for any loss or damage caused by the inclusion of the statement in the prospectus; or

(d) under s 57(f) a person named in the prospectus with his consent as an ... auditor ... of the issuer in relation to the issue of, offer for subscription ... of, or invitation to subscribe for or purchase securities, and who has made a statement that is included in the prospectus or on which a statement made in the prospectus is based, for any loss or damage caused by the inclusion of the statement in the prospectus.

Sections 58 and 153 of the SCA 1993

[169] Civil liability for misleading and deceptive acts is set out in s 58 of the SCA 1993. It prohibits a person from acting in a manner that is misleading or deceptive or likely to mislead or deceive in connection with any prospective issue. A contravention does not attract criminal liability under the section but allows the investor to recover for any loss or damage suffered as a result of any of the acts described in the four subsections detailed, under s 153 of the SCA 1993.

[170] Section 153 in turn allows for recovery of loss as a consequence of relying on the conduct of another person who has contravened Part IV by way of civil proceedings against that other person.

[171] There is a defence available under s 58 for civil liability under s 59. It provides that no such civil liability is attracted if a person proves that he had made all reasonable enquiries given the circumstances of the case and that having done so, he had reasonable grounds to believe that the statement or information was true, not misleading and contained no material omission. The onus therefore lies on the person seeking to explain the statement. The test utilised is an objective one.

Part IV of the SCA 1993 and s 328

[172] Part IV relates, inter alia, to the issue of securities and includes the requirement of all applicants, financial advisers or any other person to ensure full disclosure in any statement or information submitted to the SC. It is drafted in prohibitory form and contravention of the same gives rise to a criminal offence. Of specific relevance in Part IV is s 32B, which expressly

prohibits the parties stated to submit any statement of information that is false, misleading or from which there is a material omission. It also prohibits the relevant persons from engaging in conduct that is likely to mislead or deceive the SC.

[173] With this brief summation of the statutory provisions regulating the issuance of exempt bonds, the appeals brought by each of the appellants against the bondholders will be considered and discussed in turn in light of the findings of fact and law by the learned trial judge.

PART III

The appeals brought by each of the appellants

[174] The nine appeals will be dealt with in the following order:

(a) the appeal brought by MIBB (Appeal No W-02(NCC)(W)-1699–08 of 2017);

(b) the appeal brought by Mayban Trustees (Appeal No W-02(NCC)(W)-1696–08 of 2017);

(c) the appeals brought by EY (Appeal Nos W-02(NCC)(W)-1710–08 of 2017, W-02(NCC)(W)-2167-10 of 2017 and W-02(NCC)(W)-2168–10 of 2017);

(d) the appeal brought by Aldwich (Appeal No W-02(NCC)(W)-1708–08 of 2017);

(e) the appeals brought by AEM and Kamalul (Appeal No W-02(NCC)(W)-1709–08 of 2017); and

(f) the appeals brought by the bondholders (Appeal Nos W-02(NCC)(W)-2075–10 of 2017 and W-02(NCC)(W)-2077–10 of 2017).

(A) THE APPEAL BROUGHT BY MIBB (APPEAL NO W-02(NCC)(W)-1699–08 OF 2017)

The judgment of the trial court in relation to MIBB

[175] The trial judge delivered comprehensive and well-grounded reasons for her conclusion that MIBB was liable to the bondholders to the extent of 50 per cent of the judgment sum under the three causes of action pleaded by the bondholders. The following summarisation of Her Ladyship's meticulous judgment is necessary for the purposes of this appeal, but does little to convey the robust nature of the trial court judgment, which is best read in full.

Findings in relation to statutory breach of the SCA 1993 by MIBB

(I) Pre-bond issuance

[176] Her Ladyship found that the bondholders had established their case under ss 32B, 38(3) and 57 of the SCA 1993 against MIBB (namely the provisions relating to the submission of false or misleading statements or material omissions and the consequences of the same). The trial judge so concluded because she accepted the bondholder's reasoning that:

(a) the manner in which MIBB allowed Aldwich's revenue to be diverted elsewhere rather than into the revenue account controlled by MIBB:

(i) was contrary to the express provisions of the IM; and

(ii) caused the ring-fencing or security arrangements to fail or break down. The fact that the express representations in the IM in relation to the 'Priority of Payment' and 'Transfer of Application' were allowed to be contravened or breached by reason of MIBB allowing the diversion of funds elsewhere, rendered the information or representations in those clauses in the IM false;

(b) Her Ladyship found a 'second material omission' in the IM in that there was a failure to disclose that only 15% of Aldwich's proceeds of sale were credited into the revenue account contrary to the priority of payment and application of transfer clause which represented that all revenue of all kinds would be credited into the revenue account (the word used in the clause is 'shall'). Aseam's (MIBB's) position in the trial court that at all material times it was within their knowledge that only 15% of the proceeds would be remitted into the revenue account, Her Ladyship found, was not credible;

(c) CP20 in the IM or CP of the subscription agreement was not complied with. Her Ladyship found that some of the counterparties refused to give consent to the assignment of Aldwich's contracts to MIBB and no acknowledgements were returned to MIBB. This was not disclosed in the IM;

(d) secondly most of the counterparties to AEM's business contracts refused to consent to the novation of those contracts to Aldwich. As such Aldwich could not assign those contracts to MIBB, resulting in the execution of the two supplemental BSAs. This was never disclosed in the IM. These matters were found by the trial judge to amount to a material omission; and

(e) Her Ladyship dismissed MIBB's contention that the concept of a trust on the part of AEM in favour of Aldwich was in fact disclosed in the IM by virtue of para 8.1 under the rubric relating to BSA 1 where it was

stated that pending the novation the benefits and rights would be held by AEM on trust for Aldwich. She also rejected the contention that MIBB was entitled to rely and act on its solicitors' advice on the basis of the Federal Court judgment in *CIMB Bank Bhd v Maybank Trustees Bhd and other appeals* [2014] 3 MLJ 169 ('Pesaka').

[177] As such it was concluded that pre-bond issuance, MIBB had contravened ss 328 and 38(3) of the SCA 1993 entitling the bondholders to recourse under s 57 of the SCA 1993.

II. Post-bond issuance

[178] Her Ladyship found that MIBB, which had sole control over five of the six designated accounts, failed to monitor the movement of funds in accordance with the ring-fencing structure as represented in the IM or the bond contracts, such that all funds went into the revenue account.

[179] In this context Her Ladyship rejected MIBB's defences that it was under no obligation to ensure that all revenue was channelled into the revenue account, but merely to ensure that all monies that were deposited in the revenue account were to be applied in accordance with the 'waterfall' priority of payment; and that there was never any intention to 'ring-fence' all revenue or sales proceeds to be paid into the revenue account. Ring-fencing only arose in respect of the sales proceeds paid into the DSRA.

[180] As such the statutory causes of action under ss 57 and 153 SCA came into play as a consequence of the contravention of ss 32B and 38(3) SCA.

[181] For the same reasons, the trial judge concluded that the bondholders had also acted negligently in the performance of their duties as the lead arranger, security agent and facility agent. They had also acted contrary to the terms of the bond contracts which amounted to a breach of their contractual obligations.

The appellant, MIBB's grievances

[182] From the extensive submissions made in this appeal, the following primary issues may be gleaned.

MIBB's grievance No 1 — Failure to consider MIBB's various roles

[183] MIBB contended that the trial judge failed to appreciate that MIBB played three different roles in the Aldwich Bond Programme and its duties and obligations in respect of each role:

(a) advisor and lead arranger at the pre-bond issuance stage;

(b) security agent at the post-bond issuance stage;

(c) facility agent at the post-bond issuance stage.

MIBB's grievance No 2 — Failure to properly deal with the multiple causes of action against MIBB

[184] The bondholders' causes of action against MIBB are premised on:

(a) breach of statutory duty under the provisions of the SCA 1993 namely s 32B giving rise to causes of action under ss 57 and 153;

(b) breach of contract; and

(c) negligence.

[185] MIBB contended that the trial judge failed to deal with each cause of action separately and in a meaningful manner in arriving at her decision.

MIBB's Grievance No 3 — Failure to appreciate the important notice and the decision in *Pesaka*

[186] MIBB contended that its involvement at the pre-bond issuance stage was only as adviser and lead arranger. The responsibilities pertaining to these roles are determined by the IM and the SCA 1993. The trial judge failed to appreciate that according to the Federal Court decision in *Pesaka,* the IM was not required to be approved by the SC.

[187] MIBB contended that the trial judge failed to appreciate and apply the law in *Pesaka* on the effect of the important notice on the liability of MIBB as lead arranger regarding statements in the IM. If Her Ladyship had, she would have concluded that:

(a) there were no false or misleading statements;

(b) the IM is a product of Aldwich;

(c) MIBB as lead arranger was entitled to rely on the advice of its transaction solicitors in relation to CP16 of the subscription agreement and CP20 of the IM;

(d) MIBB as lead arranger cannot be held liable in tort or under the SCA 1993 for any false or misleading statement or material omission by virtue of the important notice; and

(e) the bondholders were 'sophisticated investors' and were expected to act on independent professional advice procured by themselves.

MIBB's grievance No 4 — Failure to consider causation

[188] MIBB maintained that the trial judge erred in failing to consider or make specific findings on causation vis a vis MIBB in relation to the causes of action pleaded against it in breach of statutory duty, breach of contract and negligence. This was to be contrasted with the approach adopted by the Federal Court in *Pesaka,* where causation was dealt with expressly.

[189] MIBB contended that the trial judge failed to appreciate that the plaintiff bondholders had not adduced evidence that the wrongful conduct of MIBB resulted in the damage they suffered. Or put another way, that but for MIBB's conduct the bondholders would not have suffered the injury.

[190] MIBB contended that the burden of proving such a causal link lay on the bondholders in respect of all the causes of action pleaded (see *Barnett v Chelsea and Kensington Hospital Management Committee* [1969] 1 QB 428; *Bonnington Castings Ltd v Wardlaw* [1956] 1 All ER 615 where the House of Lords held that the mere proof of a breach of statutory duty was insufficient, and that it was incumbent on a plaintiff to establish that that breach had given rise to the loss suffered by the plaintiff. See also *Wu Siew Ying t/a Fuh Lin Bud-Grafting Centre v Gunung Tunggal Quarry & Construction Sdn Bhd & Anor* [2011] 2 MLJ 1; [2011] 1 CLJ 409).

[191] Accordingly it is contended that even if there is a breach of statutory duty under ss 32B or 38(3) giving rise to a claim under s 57 of the SCA 1993 it was incumbent upon the plaintiff to establish causation, which the bondholders had failed to do, and which the trial judge had failed to consider.

MIBB's submission on the actual cause of the loss suffered by the bondholders — Business failure

[192] MIBB submitted that if the trial judge had considered the issue of causation the bondholders' claim would have been dismissed because the primary reason Aldwich could not meet the monthly DSRA payments from August 2009 was because the catalyst recovery business had ground to a halt and there were no other contracts available in this area. In short, MIBB maintains that the losses suffered by the bondholders was due to a failure of Aldwich's core business in catalyst recovery, rather than any act or omission on its part. Such a failure, it would follow, was a risk inherent in the investment of Aldwich bonds, for which MIBB could not be held responsible.

[193] In support of this submission, MIBB pointed to the fact that the monthly DSRA payments were promptly made from the inception of the Aldwich Bond Programme. Default only occurred some six years later in

August 2009. And it was such default that led to the issuance of a trigger event culminating in the calling of an event of default and recovery of the full sum on an accelerated basis. MIBB pointed to the fact that Aldwich's problems had commenced in or around 2006 when the rating agency, RAM had placed the senior bonds under a rating watch. Similarly there were difficulties with the WOR business as early as January 2006.

[194] Going through the nature of the business during the period from 2006 onwards, MIBB submitted that it is this downturn in business that is the proximate cause of the losses suffered. In other words, the losses were suffered by the inherent risk in investing in a bond which depended on profits from future business operations, rather than due to any act or omission on the part of MIBB.

MIBB had no duty to verify or monitor funds in general — Only in the DSRA

[195] The failure to ensure that monies went into the revenue account controlled by MIBB, and then as prioritised under the 'waterfall' arrangement, was NOT the cause of the losses suffered because not all monies flowing into the revenue account were held on trust or earmarked for repayment to the bondholders. As such it is contended that the trial judge erred in concluding that:

(a) the funds were within the control of MIBB; and that

(b) MIBB was able to independently verify the usage of these funds by Aldwich;

(c) the revenue account was the most critical feature of the ring-fencing structure when it was only money paid into the DSRA that was to be ring-fenced. In this context Her Ladyship's interpretation of the priority of payment clause was flawed;

(d) MIBB ought not to have relied on its solicitors, Albar & Partners' legal opinion that the issuance of notices of assignment were sufficient to constitute an assignment; and

(e) MIBB could not waive its CP and issue the bonds.

[196] On the contrary the funds are only earmarked or held on trust for the bondholders when monies were actually paid into the DSRA. So MIBB submitted that any duty to verify or monitor or control funds only arose at the point in time when monies were already deposited into the DSRA (presumably by Aldwich).

[197] In this context MIBB contended that the trial judge erred in concluding that the failure to credit Aldwich's proceeds directly into the revenue account was attributable to MIBB as this was a post-bond issuance matter.

Quantum of loss and apportionment

[198] The essence of MIBB's complaint is that the trial judge ought to have ordered that the damages against MIBB be assessed. Her Ladyship failed to appreciate that the sum of RM177,248,747.31 is the sum Aldwich contracted to pay the bondholders together with default interest etc. This is not therefore directly attributable to MIBB as compensation due from it to the bondholders.

[199] In any event the bondholders were required to prove their losses against MIBB notwithstanding a breach of statutory duty. Under this cause of action the bondholders whose rights were infringed were entitled to be placed in the same position as if there had been no default by Aldwich, which is a matter of assessment.

[200] MIBB asserted that if at all MIBB is liable, it should only be for the balance value of the outstanding bonds in the sum of RM125,311,159.45 after deducting monies received towards reduction of their loss such as the proceeds of sale of the WOR plant. The rationale for this is that the bondholders are not entitled to more than the value of the bonds outstanding as damages are compensatory in nature and not designed to enrich the bondholders.

[201] Secondly, MIBB submitted that a distinction is to be drawn between the primary wrongdoers and the secondary wrongdoers. MIBB is, if at all, a secondary wrongdoer as it is neither the debtor/issuer nor a guarantor. This is in line with the reasoning of the Federal Court in *Pesaka.* The sum awarded of RM177,248,747.31 is not applicable to MIBB because it represents Aldwich's indebtedness to the bondholders.

[202] Finally, it was contended by MIBB that the trial judge erred in failing to conclude that by reason of the disclaimer in the important notice which is of wide purport and exonerates MIBB from all liability, MIBB was not liable for any statutory breach, breach of contract or negligence. The trial judge failed to appreciate that Her Ladyship was bound to follow the reasoning of the Federal Court in *Pesaka* which held that the disclaimer in the important notice was binding, valid and effective and exonerated the adviser and lead arranger, KAF in that case.

The bondholders' reply to MIBB's appeal

[203] The bondholders replied to these various issues raised, relying largely on their initial comprehensive submissions and the findings of the trial judge. In summary they responded that:

(a) the trial judge had distinguished between the various causes of action in her findings as Her Ladyship made separate findings in respect of the breach of statutory duty and then only in breach of contract and negligence. The various relevant contracts at the pre- and post-bond issuance stage were separately considered as is evident from a perusal of the judgment in full commencing, inter alia, from para 181 onwards;

(b) on the issue of ring-fencing they relied on the relevant provisions of the bond contracts, as will be considered below, and as relied upon by the trial judge, to submit that on a composite reading of these contracts and as set out in the IM, the ring-fencing was created and designed to be in place at the pre-bond issuance stage. This took the form of the novation of AEM's business contracts in favour of Aldwich, and assignment of proceeds received by Aldwich directly to the revenue account under the control of MIBB where all cash proceeds would be ring-fenced and then paid out in accordance with the priority of payment clause and eventually into the DSRA. To that extent the bondholders: challenged MIBB's construction of the relevant terms of the subscription agreement, the IM and the assignment and charge agreement. They maintained that a proper construction of the bond contracts and the IM disclosed that MIBB was obliged to control all monies paid to Aldwich and to control monies paid out into the disbursement account operated by Aldwich primarily on the basis of the accepted budget for the year;

(c) with respect to causation, MIBB's submission of business failure as being the primary cause of the failure of Aldwich Bond Programme was rejected outright on the grounds that no evidence was produced by MIBB to evidence the non-performance by any party to the business contracts, nor of the volatility of the oil and gas industry directly impacting Aldwich's business. EY's cash flow also suggested otherwise, as there was continuous certification up to and until default that the DSCR both actual and projected more than met the requisite minimum ratio of 1:5. Aldwich's revenue for the financial year ending June 2008 was also one of the healthiest during the tenure of the Aldwich Bond Programme;

(d) Aldwich itself testified that between 2004 and 2009 Aldwich had generated RM717m in revenue. During a bondholders' meeting on 30 April 2009, it was reported that Aldwich had achieved revenue of RM56,341,000 and earnings before interest and tax of RM9,574,000. This discounted the possibility of business failure being the cause of the default and eventual failure resulting in the losses borne by the bondholders. Again the chief operating officer of Aldwich testified that

Aldwich had a 'further revenue of RM117m in 2009' which was noted and taken into account by the trial judge. This did not point to business failure as a tenable cause of the default and subsequent failure of the Aldwich bond. In any event, business failure as a cause was never pleaded by MIBB;

(e) a large sum of money totalling RM140,427,953.06 remained unaccounted for? Where did it go? Such loss, it was maintained, was attributable to a failure by MIBB (both at the pre-bond stage in its capacity as lead arranger and adviser) and as security agent in the post-bond stage to adhere to the design and structure of the Aldwich Bond Programme, in relation to the ring-fencing;

(f) as for quantum and apportionment the bondholders relied on the reasoning adopted by the trial judge; and

(g) in relation to the important notice and the decision of the Federal Court in *Pesaka,* the bondholders sought to distinguish the same in relation to the breach of statutory duty as well as the other causes of action.

OUR DECISION AND ANALYSIS IN RELATION TO THE APPEAL BY MIBB

[204] In addressing MIBB's appeal, we have carefully perused and evaluated the grounds of judgment of the trial judge, the comprehensive and detailed submissions of the parties, both on the facts and the law, the compendious documentary evidence and the law in this area.

[205] In relation to MIBB, it is evident from Her Ladyship's detailed reasoning from paras 176–221 initially, and then together with Mayban Trustee from paras 222 through to 229, the multiple causes of action raised against MIBB were considered fully in terms of the evidence adduced at trial and the law prior to her findings of liability under each cause of action.

[206] To fully comprehend the nature of the claims made against MIBB, the defences raised and the points raised in this appeal, it is first necessary to consider the precise and various duties and obligations undertaken by MIBB during the course of the Aldwich Bond Programme.

[207] MIBB performed multiple roles in the Aldwich Bond Programme, both pre-issuance and post issuance. The various roles it adopted are:

(a) adviser — This is essentially a pre-bond issuance role. In this capacity, MIBB gave advice to, and assisted AEM and Aldwich, the issuer, with the structuring of the Aldwich Bond Programme. This involved, inter alia, the formation of the DDWG, and complying with a wide ranging

series of obligations and functions including full compliance with statutory requirements, full disclosure about the proposed transaction and the financial status of Aldwich, AEM and AEM's business and affairs (see *Tesco Supermarkets Ltd v Nattrass* [1971] 2 All ER 127; [1971] UKHL 1 — 'Due diligence' is in law the converse of negligence and negligence connotes a reprehensible state of mind — a lack of care for the consequences);

(b) lead arranger — This is a pre-bond issuance role. In this capacity MIBB was tasked with the obligation to:

(i) procure investors for the Aldwich Bond Programme and to distribute the bonds when issued premised on the IM, ie marketing the bonds to potential investors;

(ii) MIBB as lead arranger was also the principal person responsible for the IM in that it was the collating and summarising body, which put together the document together with the issuer. As such MIBB was responsible for ensuring that the IM, (which requires lodgement with the SC), accurately reflected the terms and conditions of the bond issue. This is underscored by the fact that the IM is statutorily accorded the status of a prospectus in terms of disclosure, therefore requiring adherence to high standards (see s 38(3) of the SCA 1993 which is now s 229 of the CMSA 2007);

(iii) MIBB as the lead arranger was also responsible for ensuring that all conditions precedent prior to the issuance of the bonds had been complied with. This included ensuring that all security arrangements ring-fencing cash proceeds were in place to ensure that there would be repayment of the financing granted by the bondholders;

(iv) as lead arranger and primary subscriber, MIBB entered into a subscription agreement dated 22 May 2003 with Aldwich. Schedule 1 contains the conditions precedent to be adhered to, of which the need to ensure that novation and assignment of AEM's business contracts had been achieved (see the topic below on CP16);

(c) primary subscriber — MIBB was also the largest and primary subscriber of the Aldwich bonds under the programme. The terms and conditions of such subscription are set out in the subscription agreement;

(d) security agent under the assignment and charge agreements — This is a post-bond issuance role. MIBB acted as custodian of and had control over all assets and security arrangements to secure repayment of monetary obligations on the specified maturity dates; this included ensuring that all payments were received into the revenue account and then distributed as prioritised under the relevant contracts. In short, a monitoring and distribution function rested on the security agent.

Needless to say, when there has been a failure to adhere to the priority system put in place, it is incumbent upon the security agent to notify the trustee and the bondholders. MIBB's duties are governed, inter alia, by assignment and charge agreement between Aldwich and MIBB of even date;

(e) facility agent — This is a post-bond issuance role. MIBB facilitated the issuance and oversaw the administrative and operational features of the transaction; and

(f) calculation agent — This is a post-bond issuance role arising under contract. MIBB had the task of computing the requisite payments.

[208] These duties and functions of MIBB as the lead arranger are found both under statute and the various contracts it entered into with the issuer as well as the bondholders in its various capacities. This in turn requires study.

The documents and contracts detailing MIBB's obligations in its various capacities for the Aldwich Bond Programme

Lead arranger and adviser — Pre-bond issuance

I. The planning memorandum

[209] One of the primary documents that requires study to comprehend the ambit of MIBB's obligations as lead arranger is the planning memorandum. As explained at the outset, the planning memorandum, which is prepared by the transactional solicitors, is a guide for all the members of the DDWG comprising, inter alia, MIBB as a member. It sets out the individual and collective responsibilities of all its members for the purposes of the due diligence exercise undertaken by the body.

[210] The objective of the due diligence investigation in turn is to ensure that there is full compliance with the SCA 1993 (now the CMSA 2007). In order to ensure such full compliance all relevant and material information must be disclosed about the issuer, Aldwich, its officers, the financial advisers, the experts and any other person involved in preparing the submission to the SC. As stated at the outset, disclosure is the heart of securities, be they bonds, sukuk or other instruments, whether traded on the primary market or the secondary market as is the case here.

[211] The establishment of the DDWG to conduct the inquiry or due diligence on behalf of the lead arranger and the issuer is one of the lead arranger's duties in the instant case (see cl 3.1.1 of the planning memorandum). It was incumbent upon the members of the DDWG to ensure that the IM did

not contain false or misleading statements or any material omissions (see cll 3.1.4 (i) and (ii) of the planning memorandum). The standard of care required has been detailed at the outset in para 56.

[212] The different responsibilities of each of the participating members of the DDWG is also detailed in the planning memorandum. As adviser and lead arranger MIBB was required to:

(a) advise on the proposed programme and structure and approvals;

(b) verify such matters that fall within its responsibility under the due diligence checklist;

(c) prepare the submission to the SC and all other regulatory bodies. In the course of doing so, MIBB was under an obligation under statute (vide ss 38(3), 32B, 57 and 153 of the SCA 1993) and in contract (subscription agreement) to ensure that the submission to the SC and the subsequent IM did not contain any statements or information which was false or misleading, and that there were no material omissions; and

(d) continue with due diligence after the submission to SC for approval.

[213] Clause 3.6 of the planning memorandum specified that each DDWG member, was bound to report any material discrepancy or change of event to report the same to the lead

arranger for onward reporting to the SC, failing which the member may be deprived of the defences available to them.

II. The verification report

[214] MIBB prepared a verification report that required each member of the DDWG to confirm their individual responsibility in relation to the IM. It emphasised expressly that the verification exercise was intended to ensure that no incorrect statement was made and that no false or misleading statements nor material omissions would be made in the IM. As such it was incumbent on MIBB as the proponent of the verification report to ensure that it complied with the duty of full disclosure.

III. The subscription agreement

[215] The subscription agreement was made between Aldwich, the issuer, MIBB in its capacity as the lead arranger and MIBB in its capacity as the primary subscriber. MIBB therefore wore two 'hats' as it were under this agreement. It is arguable that MIBB was in a position of conflict of interest. In

the instant case, there might have been a conflict in that CPs had not been fulfilled. Yet MIBB in its capacity as primary subscriber was in a position to waive these CPs. This puts the lead arranger in a position of conflict because as lead arranger, the primary concern is the bondholders while as primary subscriber, it is the subscriber's own investment that takes priority, hence the waiver.

[216] The subscription agreement essentially provides for the subscription of the bonds by the primary subscriber on specific terms and conditions as set out there. It is of relevance in the instant appeal by MIBB by reason of the part played by MIBB in its capacity as lead arranger and its obligations under cl 5 of the agreement which deals with the requirement to fulfil conditions precedent set out in the agreement.

III(a) Clause 5 of the subscription agreement

[217] Clause 5.1 of the subscription agreement provides that the primary subscriber's obligation to subscribe to the bonds in their entirety is subject to receipt by the lead arranger of the documents and evidence specified in Schedule 1 of the agreement. The receipt of these documents and evidence therefore comprised conditions precedent to MIBB's obligation to subscribe to the entire bond issue. These conditions precedent had also to be complied with prior to any request for the issuance of the bonds. It is this latter aspect that is of relevance here.

III(b) CPs in Schedule 1 of the subscription agreement

[218] There were twenty CPs that required compliance. CP16 is the one in issue, in that compliance was not effected, and MIBB was advised so by its solicitors. CP16 requires that prior to subscription and the request for the issue of the bonds, sufficient documentary evidence of:

(a) the consent of counterparties of the business contracts of AEM to an assignment of the contracts to the security agent, ie MIBB pursuant to the provisions of the assignment and charge agreement; and

(b) evidence that notices of such assignment have been served and the acknowledgement of such notices duly received.

[219] There was therefore a clear obligation on the part of MIBB in its capacity as lead arranger, pre-bond issuance, to ensure that the consent of the counterparties to the business contracts of AEM being assigned to MIBB as security agent under the Alwich Bond Programme, and that evidence of the same was available through service of such notices of assignment and receipt of acknowledgement of such notices of assignment.

[220] The trial judge relied on the failure to comply with this CP and the unilateral variation of the CP, without disclosure to the SC or in the IM to conclude that MIBB had contravened, ss 32B, 38(3) and 57.

[221] Her Ladyship's finding on this issue is therefore, with respect, faultless.

[222] It follows from the duties and obligations outlined in the foregoing documents which MIBB agreed to undertake, the chronology of events which evidence MIBB's acceptance of the ambit of its statutory and contractual duties as lead arranger and adviser that there were clear breaches of the obligations that MIBB had undertaken contractually and under statute, to oversee, monitor and be responsible for. This was the express finding of the learned trial judge, and again the conclusion to be drawn by this court, in its appellate capacity is that Her Ladyship's findings and reasoning are not flawed, as contended by MIBB.

III(c) Clause 5.2 of the subscription agreement

[223] Clause 5.2 of the subscription agreement provides that the CPs may be waived by the primary subscriber ie MIBB without prejudicing its rights as primary subscriber. MIBB seeks to rely on this clause to contend that it was entitled to vary or waive the conditions precedent and therefore cannot be faulted for the variation made to the structure of the Aldwich Bond Programme.

[224] However the trial judge relied on the testimony of MIBB's primary witness, Saraswathy, who confirmed that any such waiver would prejudice the other bondholders.

[225] In any event it must be noted that such waiver was only open to MIBB in its capacity as the primary subscriber, not as lead arranger. As lead arranger it was bound to comply with ss 38(3) and 32B of the SCA 1993 as well as its obligations in contract. To that extent MIBB would have been placed in a position of conflict if it had sought to waive the conditions precedent given the contents of the IM, which represented a scenario consistent with compliance of all conditions precedent. It was not a tenable position for MIBB to adopt.

IV. The SC's approval letter

[226] The SC's letter was conditional and expressly stipulated that the SC's prior approval was required for any amendments on the terms and conditions

of the Aldwich senior bonds. Secondly that full and frank disclosure was to be made to all prospective investors on all risk in the proposed transfer of AEM's business to Aldwich.

[227] These two conditions make it crystal clear that MIBB was duty-bound as instructed by the regulatory authority to:

(a) report to the SC about the failure to adhere to CP20 of the IM (or CP12 of the subscription agreement);

(b) advise the SC that it was going to vary those conditions and effectively waive the conditions precedent in their original form. This in turn would have the effect of materially altering the structure and security, ie the ring-fencing provisions of the Aldwich bond structure; and

(c) MIBB was further required to make full disclosure of these matters to all potential investors on the risks that could arise in relation to the intended transfer of business from AEM to Aldwich.

[228] None of the foregoing conditions were complied with or adhered to. On the contrary, the fact that two supplemental BSAs were entered into on 7 August 2003, a week prior to the issuance of the bonds, was deliberately kept secret and not disclosed to potential investors. As a consequence, it is evident that MIBB failed to comply with the express conditional approval granted by the SC. That, in itself, is a breach of both its statutory and contractual obligations.

[229] MIBB in its submissions complained that the trial judge failed to identify the alleged false and misleading statements in the IM at the time the IM was issued. It is apparent from the foregoing that the matters outlined above afford MIBB the specificity it asks for, which in any event should be well within its knowledge.

[230] In short, there was material non-disclosure prior to the issuance of the IM which rendered the information therein false and misleading in respect of the matters outlined above. These statutory breaches have an important bearing on the 'important notice' defence which MIBB seeks to utilise, relying on the *Pesaka* case.

Our conclusion in relation to the judge's findings in relation to MIBB's breaches and contravention of securities law in its capacity as the lead arranger (and adviser)

[231] It is therefore clear that the lead arranger's role was a pivotal one at the pre-bond issuance stage, particularly in terms of disclosure of all material information on a continuing basis until full implementation of the Aldwich

Bond Programme. This encompassed the need to report changes in the structure of the Aldwich Bond Programme, such as:

(a) the inability to execute or effect the novation of all AEM's business contracts to Aldwich, such that Aldwich stepped into AEM's shoes in relation to those contracts. This meant that contrary to what was stipulated in the IM, the business contracts of AEM would NOT be transferred or passed on to Aldwich and then assigned to MIBB in its capacity as security agent, but would remain with AEM. Instead, AEM undertook to hold all such business proceeds on trust for Aldwich and remit the same to Aldwich, but this was detailed in a supplemental BSA, which was not disclosed in the IM.

This is clearly a material or substantive change. It meant that the issuer would not be in control of the catalyst recovery business as it was not privy to such business contracts. The business contracts remained with AEM, meaning that the business continued to be run and operated by AEM. This ran contrary to the fundamental basis of BSA 1. It was also moot as to how the undertaking by AEM would be monitored or enforced. As such there was a clear lacuna created in the ring-fencing structure of the proposed Aldwich bond issuance in that the monies by which the bondholders would be repaid was no longer secured or ring-fenced, because the cash proceeds from the business were no longer to be received by the issuer, Aldwich, but by AEM;

(b) the failure to assign the proceeds from the business counterparties directly to the security agent in the revenue account, controlled solely by MIBB. This second substantial variation to the original structure of the Aldwich Bond Programme meant that all monies received for and on behalf of Aldwich would no longer be remitted directly to the revenue account controlled by MIBB, as envisaged and represented in the IM to the bondholders. The representations made expressly stipulated that all revenue due to Aldwich would be effectively ring-fenced because it would flow from the business counter parties to the revenue account by reason of the novation of business contracts, and the subsequent assignment of all cash proceeds from the business as well as other sources directly into the revenue account.

Aldwich could have no recourse to this account as it was controlled directly by MIBB. MIBB in turn would make payments in accordance with the tiered waterfall priority of payment stipulated under the bond contracts in its capacity as security agent (post-bond issuance).

However as no assignments were effected, the net result was that monies could be remitted to the disbursement account, to which Aldwich had direct access.

This meant that a second lacuna or breach was effected in relation to the original ring-fencing security created by the remittance of all cash proceeds to the revenue account operated solely by MIBB. This again amounted to a material change or variation that warranted disclosure pre-bond issuance by the lead arranger. However this was not done.

[232] As a consequence the express representations and statements in the submission to the SC and the IM were inaccurate, false and misleading. These representations, as a consequence of the alterations by virtue of the execution of the supplemental BSAs, also amounted to material omissions;

[233] In summary therefore the following material facts were not disclosed in the IM:

(a) that Aldwich had not assigned its rights and title to the sales revenue and other income;

(b) the proceeds of sale of the business contracts with third parties would not be credited directly into the revenue account;

(c) that only 15% of the proceeds of sales and Aldwich's catalyst recovery business would be paid to Aldwich;

(d) that neither AEM nor Aldwich had received acknowledgement of the notices of assignment and letters of novation from its counterparties or customers to the effect that they assented to the assignment or novation of these contracts from AEM to Aldwich;

(e) neither had Aldwich obtained acknowledgment of the notices of assignment of all its business contracts to MIBB; neither had they agreed to pay the proceeds directly into the revenue account controlled by MIBB;

(f) the existence of the two supplementary agreements varying the terms and conditions of the entire structure of the Aldwich Bond Programme were not disclosed. This was particularly important because the underlying and main mechanism of repayment to the bondholders, namely vide the assignment of the total proceeds of sale received by Aldwich directly into the revenue account had been diluted substantially as the basis was now dependent upon AEM holding the proceeds in trust for Aldwich. It was therefore subject to the further contingency that AEM would in fact transfer such proceeds as and when they came in; and

(g) there was a failure to disclose the existence of the important notice containing a disclaimer of liability entirely for whatever errors or omissions might arise.

[234] MIBB argued that it was fully entitled, on the advice of its solicitors, to effect such variations to the original structure of the bonds, contending that these were not material or substantive alterations. In this context too it falls back on the advice of its solicitors, contending so on the basis of the Federal Court decision in *Pesaka*.

[235] While the Federal Court decision in *Pesaka* is considered later in the judgment, it is important to note that the learned judge found that contrary to this contention, MIBB's solicitors ultimately left it to MIBB's discretion as to whether to proceed in the manner of the resolution they proposed, or otherwise. The trial judge so concluded on a full reading and consideration of Albar's opinion.

[236] We find no reason to disagree with the learned judge's construction of the legal advice, nor of Her Ladyship's subsequent finding that accordingly it was MIBB that exercised its discretion and made a decision:

(a) to adopt the varied structure suggested by the solicitors; and

(b) not to provide disclosure of these substantive variations to the SC; and

(c) not to provide disclosure of the same to the bondholders who had no access to this information but relied on the IM, which remained in its original form.

[237] As stated by the trial judge, it was open to MIBB in the best interests of all parties to delay the issuance of the bonds until compliance with CP16 had been obtained. In all these circumstances we are of the view that the learned trial judge was entirely correct in her findings.

[238] It is arguable that MIBB as the lead arranger owes the bondholders a fiduciary duty, see *The Fiduciary Role of the Manager and the Agent in a Loan Syndicate* by Charles Qu, Associate Lecturer at the Faculty of Law, Griffith University, published in the Bond Law Review, Vol 12, Issue 1, Article 7 (2000). Even if this approach is not followed, where the arranger has actual knowledge of incorrect information in the IM, the arranger has the obligation to make disclosure (see *Arranger Liability in the Euro Markets* by Denis Petkovic, published in the January 2008 Ed of the Banking Law Journal) (this article discussed the case of *IFE Fund SA v Goldman Sachs International* [2006] EWHC 2887 (Comm) which confirmed that participants in the euro-markets will be bound by documents that they enter into and that disclaimers from liability will normally be effective in negating any duty of care of an arranger. The arranger only will be bound to make disclosure if it has 'actual knowledge' that information it holds renders an IM previously circulated materially incorrect. The author concluded that this case upholds the principle of freedom of contract, especially in relation to sophisticated investors. However

it is clear to us that if an arranger must make disclosure if it actually knows that it holds renders a previously circulated IM materially incorrect, what more here when at the time the IM was circulated, the supplemental BSAs had already been executed, meaning that the IM was already incorrect at the time of being circulated!) . What more in the present case, where the IM failed to disclose the existence of the supplemental BSAs, which were executed before the IM was prepared and circulated.

MIBB's duties and obligations post-bond issuance

[239] MIBB undertook various contractual obligations post-bond issuance. In this sense it undertook multiple roles:

(a) MIBB held the charged assets on trust for all the secured parties namely the security agent, the trustee, the bondholders and the noteholders under cl 2.2 of the security agency agreement between Aldwich, AEM, MIBB and Mayban Trustees. In essence by this agreement Aldwich and AEM granted security to Mayban Trustees to secure their indebtedness under the bonds trust deed. MIBB agreed to act as security agent and to hold the benefit of the security documents and the security created, on trust for the secured parties. In the present context the relevant secured parties are the bondholders. The security took the form of the assignment of the business proceeds of AEM/Aidwich's catalyst recovery and other business and income as well as the entire undertaking properties, assets and rights of Aldwich and AEM. All these assets became 'charged assets' under the control of, and held by MIBB in its capacity as security agent;

(b) by virtue of the substantive alterations in the bond structure as evidenced by the supplemental BSAs, MIBB was, post-bond, under a duty as security agent to ensure that AEM complied with its undertaking under the supplemental BSAs to remit all monies received directly to the revenue account — see cl 2.4(k) of the supplementary BSA 2;

(c) MIBB was required to remit on a quarterly basis the requisite amounts from the revenue account to the disbursement account for the payment of operational and capital expenditure based on the budget put forward by Aldwich and accepted as adequate;

(d) Aldwich and AEM had undertaken to give MIBB in its capacity as Security Agent such information as it might reasonably require (see cl 8.1(a) of the security agency agreement and cl 4.2 of the assignment and charge agreement). This clause envisages that MIBB had a duty to monitor and regulate and enquire about the flow of monies from the business contract counterparties to the revenue account through AEM and Aldwich. This was never done, MIBB taking the position through

its witness, Saraswathy, that there was no such duty. This clause belies that statement. In any event the trial judge rejected her evidence and there is again, no reason whatsoever to fault Her Ladyship for doing so;

(e) MIBB as security agent had a power of attorney over the charged assets allowing it to do all necessary things to the extent that AEM and Aldwich could. This clause would be rendered meaningless if there was no duty on the part of MIBB to check on or monitor the movement of monies;

(f) MIBB having control of the five designated accounts was under a duty to ensure that the waterfall nature of the flow of monies was strictly adhered to. This clause, clearly envisages, as a prerequisite to such cascading of the monies received, that the monies were in the first place received into the revenue account;

(g) post-bond, MIBB's duties were also set out and governed by the assignment and charge agreement between Aldwich and MIBB dated 22 May 2003. MIBB was entrusted to ensure that all cash flow proceeds were paid by Aldwich into the revenue account as Aldwich had undertaken to do under the assignment and charge agreement;

(h) it was also under a duty to ensure that Aldwich deliver the acknowledgments of the notices of assignment pursuant to the provisions of the assignment and charge agreement — see cll 5.1 and 5.2;

(i) under cl 3.2 of the assignment and charge agreement Aldwich charged the designated accounts, all monies there, the cash flow proceeds to MIBB as security agent, by way of a fixed charge. The disbursement account was secured by a floating charge, which was converted to a fixed charge upon the happening of a trigger event or event of default;

(j) under cll 4.1 and 4.2 of the assignment and charge agreement, MIBB as security agent (under the security agency agreement, which provisions were incorporated by reference) held the security, ie all monies flowing to Aldwich, on trust for the bondholders. The duty of MIBB was to ensure that all notices of assignment were delivered to it by the business counterparties and duly signed and delivered with the respective acknowledgements. In other words, MIBB in its capacity as security agent had a duty to ensure that all assignments from counterparties were validly completed, such that monies would flow directly from them into the revenue account over which it had control; and

(k) the existence of such an obligation may also be gleaned from cl 7 where Aldwich undertook that it would pay or cause to be paid all cash flow proceeds into the revenue account. It was not entitled to withdraw any monies from the designated accounts without the express written

consent of MIBB. Again this underscores the degree of control MIBB exercised as security agent post-bond issuance in relation to all of Aldwich's business proceeds.

[240] To that extent MIBB's obligations are clearly set out and delineated under both the security agency agreement as well as the assignment and charge agreement.

Did MIBB have a duty to regulate or monitor the five designated accounts, particularly the revenue account?

[241] The primary issue here is whether MIBB had a duty to monitor or regulate the flow of monies from the business contract counterparties. This is particularly so, in view of the execution of the supplemental BSAs, which meant that monies were NOT flowing directly from contract counterparties into the revenue account, but first into AEM's account and then into Aldwich's account. Was there an obligation to:

(a) monitor the movement of monies from AEM which ought to have gone directly into the revenue account under its control, rather than into the disbursement account which was under Aldwich's control? and

(b) monitor monies in the disbursement account and ensure that they were channelled into the revenue account?

[242] MIBB maintains, on a reading of the relevant parts of the assignment and charge agreements and the IM, that it had no duty to 'ring-fence' profits from Aldwich's business operations so as to:

(a) ensure that all monies went into the revenue account (pre-bond issuance); and

(b) ensure that all monies in the revenue account were paid out in accordance with the tiered or waterfall order of priority.

[243] The answer to this issue must turn on a construction of the assignment and charge agreement, the representations made in the IM and a consideration of the structure and design of the Aldwich Bond Programme. More importantly it is essential that conclusions are not drawn on a 'snapshot' basis, ie by viewing various stages in the programme in isolation but to construe the entirety of the flow of the Aldwich Bond Programme in order to arrive at an accurate conclusion.

[244] The fact that Aldwich gave its undertaking to MIBB in its capacity as the security agent acting on behalf of all the bondholders, implies strongly that such a monitoring function does exist. It is inconceivable that the security

agent's duty under this security agreement was to simply do nothing in terms of monitoring or assessing compliance, until complete default occurred some six years later. Such a construction, which serves to reduce the security agent's duties to virtually nothing, defies common sense.

[245] The fact that MIBB as security agent had such a monitoring function is also borne out by the fact that express provision is made that it remained the sole signatory of the designated accounts, particularly the revenue account. The security agent was also to be informed of all business contracts entered into post-bond issuance. This again signifies the existence of a matching obligation on the part of the security agent to ensure that all subsequent contracts entered into with Aldwich were similarly assigned and charged in favour of the bondholders.

[246] It is evident from the series of obligations expressly undertaken by MIBB as security agent, under both agreements post-bond issuance, that it had undertaken complex and onerous duties in order to safeguard the position of, inter alia, the bondholders (where it was the primary subscriber). As outlined above, these obligations whether viewed singly or cumulatively, point unerringly to MIBB's clear duty under the two primary BSAs as well as under the supplemental BSAs, to verify and check that contract proceeds were received from AEM and Aldwich into the revenue account, and from there through the clear cascading structure that had been delineated to ensure control over the monies.

[247] It is equally clear that no such control was ever exercised. This is evident from the finding of the learned trial judge who carefully weighed and evaluated Saraswathy's evidence. It is one of the judge's findings that MIBB had in fact monitored the movement of the funds in the revenue account (see bondholders minutes of meeting on 13 January 2010).

[248] The trial judge concluded, amongst other things, that Saraswathy's position that MIBB's role was purely administrative and ministerial was simply not credible in view of this clear documentary admission. The finding is sound.

[249] Given the express obligations outlined above, can MIBB's contention, namely that it had no duty or obligation to monitor the revenue account to ensure that Aldwich (or AEM) was remitting monies into the revenue account, then be credibly accepted? Their stance was that no such duty subsisted and their only duty was to monitor monies that entered into the (DSRA) and that too, only to the extent required to meet the quarterly obligations to make payments out to the bondholders.

[250] Such a construction runs awry of the provisions of the agreements which envisage in the instant case that MIBB as the lead arranger undertakes primary responsibility as a gatekeeper for the funds/proceeds of AEM and Aldwich's businesses. It had an equally important function to monitor, regulate and enforce default in the remittance of monies from AEM and Aldwich to the remittance account and from there through the cascading waterfall structure of the other designated accounts.

[251] None of this was done, purportedly on the construction of the bond contracts such that MISS's duties were limited to ring-fencing only in respect of the DSRA, and that too, only to the extent required to meet the quarterly repayments due to the bondholders. To adopt the construction advocated by MIBB would be aberrant in that it would render MISS's duties and obligations as lead arranger under the Aldwich Bond Programme virtually nugatory.

[252] Therefore when the evidence is considered in totality, MIBB's position is simply unsustainable, in view of the numerous express contractual provisions setting out MISS's duties and obligations with clarity. As such duties subsist, the failure to adhere to most of the express obligations outlined, it follows that the only possible conclusion to be drawn is that MIBB was in breach of its obligations post-bond issuance in the material particulars as specified above.

[253] Therefore the trial judge cannot be faulted for concluding that MIBB breached its duties and obligations both pre- and post-bond issuance.

[254] Neither can the trial judge be faulted for concluding that MIBB breached its statutory obligations as specified under the SCA 1993. This took the form of a deliberate failure to disclose material information and to deliberately choose to hide substantively material information to the subscribers of the bonds, such that the IM was misleading and false. That in turn carries statutory liabilities.

Duty of care

[255] As for the cause of action in negligence it is apparent from the statutory duties owed by MIBB to the bondholders that a duty of care subsisted. In other words the SCA 1993 imposes duties on a lead arranger such as MIBB to ensure that information given to potential subscribers is full and complete in order that they may make an informed decision whether or not to participate in the Aldwich Bond Programme. This creates a duty of care as MIBB and the prospective subscribers have a relationship which is sufficiently proximate to warrant the existence of a duty of care (see generally on duty of care, *Caparo Industries plc v Dickman* [1990] 2 AC 605).

Breach of duty of care

[256] When such information is incomplete, thereby giving impressions that are false and misleading, then the duty of care is breached, as are MIBB's express contractual obligations. The statutory duties prescribed by the SCA 1993 are equally breached.

Foreseeability of loss

[257] The question that then follows is whether the loss suffered by the bondholders is attributable to such breaches of the duty of care, the contractual breaches and/or the statutory breaches. This warrants a consideration of the issue of causation.

Our finding on the issue raised by mibb that the trial judge did not consider causation

[258] MISS's primary grievance is that the trial judge did not address her mind specifically to the issue of causation. In essence the contention is that even if MIBB has breached its obligations it does not automatically follow that the losses suffered by the bondholders was caused by the these breaches. There were numerous other parties or events which could have caused the failure of the Aldwich Bond Programme, including the acts and omissions of the primary defaulters, namely AEM, Aldwich and Kamalul who controlled both entities, or the failure of the entire business as a consequence of a variety of adverse events.

[259] A reading of the trial court's judgment discloses that the trial judge did in fact consider the issue of causation although the judgment does not expressly set out a heading of 'causation'. The fact that the pre-bond issuance non-disclosure resulting in inaccurate statements in the IM caused loss to the bondholders is considered, inter alia, in the following paragraphs of the judgment:

(a) para 192(i) and (ii) — for the cause of action premised on statutory breach as well as contractual breach and negligence pre-bond issuance;

(b) para 193(c) and (d) — as above, also pre-bond issuance;

(c) para 196 — pre-bond issuance;

(d) para 199 — pre-bond issuance

(e) para 201(d), (e) — post-bond issuance for all causes of action; and

(f) para 203(a), (b), (c), (d), (e), (f), (h) — loss of monies is established as a consequence of the failure of MIBB to fulfil its gatekeeper role post-bond issuance under the unilaterally revised Aldwich Bond Programme.

[260] All this culminated in the trial judge's conclusion that the bondholders had established their case in negligence, contract and under statute. In short the issue of causation was dealt with together or cumulatively with the breaches of duties, explaining the consequences of failing to adhere to its duties as a lead arranger, both pre- and post-bond issuance. It is therefore inaccurate to state that the learned judge failed to consider the issue of causation.

Our analysis of causation vis a vis MIBB as lead arranger

[261] In the instant case MIBB was both the lead arranger as well as the primary subscriber. In its role as the primary subscriber its duty and function was to market and sell the bonds to other prospective subscribers, such as the respondent bondholders here. Given its dual capacity the fact that MIBB chose to proceed with the issuance of the bonds, despite the fact that fundamental CPs pertaining to the ring-fencing and security aspects of the Aldwich Bond Programme had not been met, was a primary or proximate cause of the loss suffered by the bondholders.

[262] As has been explained earlier, as a consequence of these breaches, namely:

(a) the failure to disclose that there had been no novation or assignment of the business contracts of AEM to Aldwich;

(b) that significantly large contracts such as the US bullion contract had not and could not be assigned to Aldwich by reason of the non-assignable clause subsisting in its contract with AEM;

(c) consequently the failure to assign the business proceeds from these contracts directly to the revenue account within the sole control of MIBB;

(d) the failure to disclose the execution of the two supplemental BSAs which substantively varied the structure and design of the Aldwich Bond Programme in that monies would now be held by AEM on trust for Aldwich with an undertaking to remit the same to Aldwich and for Aldwich to then remit the same to the revenue account;

(e) the failure to disclose the material and substantive variations to the Aldwich Bond Programme in the IM prior to the issuance of the bonds; and

(f) the failure to disclose the above variations to the SC at any stage, notwithstanding the express requirement imposed by the SC that it be kept informed of any changes in the programme,

The ring-fencing mechanisms and security design of the original Aldwich bond structure no longer subsisted. The natural consequence or result of the destruction of this security feature and design was that neither AEM nor Aldwich complied with its undertakings. MIBB failed and/or neglected to monitor or regulate the security features it ought to have done resulting in the losses suffered by the bondholders.

[263] In law, the acts and omissions of MIBB in terms of its non-disclosure coupled with the consequences of the substantive changes it made to the structure of the Aldwich Bond Programme without notification to the subscribers or the SC, resulting in the bondholders subscribing to these bonds under a mistaken or false or misleading belief or understanding that all business proceeds from the businesses of AEM were already novated or assigned to the benefit of Aldwich with the counterparties paying monies owed to Aldwich directly into the revenue account operated solely by MIBB. This was not the case.

[264] The bondholders were therefore induced into entering into the Aldwich Bond Programme under representations which were untrue prior to the issuance of the bonds. MIBB knew that these facts were untrue but chose not to disclose the same.

[265] The true facts were such that the security features had been diluted to the extent that the sanctity of the programme was wholly dependent upon the Issuer, Aldwich and AEM both entities being under the control of Kamalul.

[266] Therefore the failure of MIBB as lead arranger and primary subscriber to comply with the CPs and the failure of MIBB to disclose that the CPs had not been complied with either to the SC or the bondholders, caused the destruction of the original security features and design of the programme resulting in a loss of the future proceeds of business and the ultimate loss suffered by the bondholders. To our minds, the issue of causation is amply made out.

[267] MIBB argues that the primary culprits are Kamalul, AEM and Aldwich who 'took' or secreted away the monies. But that does not detract from the fact that these entities could not have 'secreted' away the business proceeds and profits but for MIBB's acts and omissions as stated above. Put another way, the proximate cause of the losses suffered by the bondholders is the failure of MIBB to adhere to the requirement to fulfil the CPs prior to issuance of the bonds.

The defence of the important notice and the Federal Court decision in *Pesaka*

[268] MIBB relies as a substantive ground of appeal on the Federal Court decision in *Pesaka.* MIBB maintains that the trial judge erred in failing to apply and adhere to the principles expressed in that case. The trial judge here ruled that *Pesaka* was distinguishable and not relevant in determining liability here.

[269] More particularly MIBB submits that:

(a) as was the case in *Pesaka,* the lead arranger here too is absolved of liability by reason of the important notice set out as part of the IM which disclaims all liability whatsoever for all acts and omissions on its part such that it is not to be held liable under any circumstances whatsoever for any losses suffered by the bondholders; and

(b) similarly too on the factual matrix, MIBB denies liability for any losses suffered by the bondholders as it carried out its duties which it describes as administrative and ministerial entirely in accordance with what was expected of it. The waiver of the CPs and the imposition of a new structure were necessary it maintains. Moreover such variations were undertaken on the advice of their solicitors which they were entitled to rely upon. For this proposition they rely once again on *Pesaka* maintaining that the Federal Court there held that the lead arranger there was entitled to rely on the advice of the transactional solicitors.

[270] MIBB maintains that this court is bound by the doctrine of stare decisis to follow *Pesaka* and cannot deviate from the principles laid down there.

[271] In order to ascertain the force and veracity of MIBB's submission it is necessary to examine the decision in *Pesaka.* There Pesaka, the issuer had obtained three government contracts. Pesaka needed financing and proposed to do so through the issuance of public Islamic bonds worth RM140m ('the bonds'). KAF was the lead arranger, facility agent and issue agent for the issuance of the bonds. The primary subscriber was Kenanga.

[272] A due diligence working group was set up and obtained all necessary information to work out a bond structure and scheme the details of which were contained in the information memorandum. As is the case here, Pesaka supplied the requisite information which ought to have been verified and ascertained by each of the members of the due diligence working group.

[273] The scheme envisaged that Pesaka's contracts with the government would be charged as security for the financing. The contracts were defence contracts that Pesaka had signed with the Bomba and the Ministry of Defence ('MINDEF'). The bondholders would supply the requisite financing in

consideration of the repayment of the monies financed together with additional sums on or by the maturity date. Repayments were to be effected periodically as was the case here.

[274] The mechanism for ensuring repayment and protecting the financial interests of the bondholders was that the proceeds from the government contracts were to be paid into accounts opened by Pesaka but where Maybank Trustees Bhd would be the trustee and sole signatory. These accounts, like the designated accounts here, were syariah designated accounts. The ring-fencing security feature was that only the trustee would be sole signatory of the syariah designated accounts (in like manner here the lead arranger, MIBB had sole control of the designated accounts. However to complicate matters in the instant case MIBB was also the primary subscriber).

[275] In *Pesaka,* the issuer Pesaka, entered into the trust deed with Maybank Trustees Bhd (on behalf of all the bondholders). Where things went wrong were that instead of opening up new syariah designated accounts, Pesaka's existing conventional accounts were used as the designated accounts. This was approved by the due diligence working group. It remained for the trustee to be made the sole signatory for these designated accounts. However that did not happen as Maybank Trustees Bhd was not the sole signatory to these accounts. Pesaka remained a signatory and effectively maintained control over all the accounts.

[276] The bonds were all issued firstly to Kenanga as the primary subscriber and then onsold to the plaintiffs. Financing was given out and it was deposited into the designated accounts which remained within Pesaka's control. Pesaka then utilised the monies for its own purposes and failed to redeem the bonds on the maturity date.

[277] The Federal Court finally determined that KAF incurred no liability whatsoever in terms of the losses suffered by the bondholders and could not be said to have caused the losses suffered because it had carried out the duties required of it in contract and tort. The primary party liable for the loss it was held was Maybank Trustees Bhd because it was their duty to ensure that the syariah designated accounts were opened and that they were the sole signatories to those designated accounts. Even under the varied scheme they had failed to ensure that they were made signatories to the scheme. In these circumstances the Federal Court found that the most proximate cause of the loss suffered was the failure to open the designated accounts and that duty fell on Maybank Trustees Bhd.

[278] In this context MIBB (as do other parties) seek to rely on the initial part of the Federal Court's statement as to the cause of loss which it was held was

directly attributable to Pesaka. This is what was said:

> Cause of Loss
>
> [82] The next issue to be considered is the cause of loss. From the evidence the cause of loss is directly attributable to Pesaka who had misappropriated the fund. The facts revealed that instead of using the monies to repay the bondholders, Pesaka had utilised the monies for its own purposes in breach of the terms and conditions as contained in the issue documents ...
>
> ...
>
> [87] *Premised on the above, it is our view that the most proximate cause of the loss was the failure on the part of MTB to ring-fence the designated accounts or alternatively to stop Pesaka from operating the designated accounts.* MTB could have done that by using its powers and rights as vested upon it by the trust deed and the power of attorney. In our view, MTB is wholly to blame for the loss and not KAF. (Emphasis added.)

[279] It is clear from the reading of the case that the Federal Court did not hold that the proximate cause of the loss was the issuer who had effectively siphoned off the monies, but Maybank Trustees Bhd for failing to ring-fence the designated accounts and from preventing the issue from utilising the accounts.

[280] Drawing a parallel with our case, it follows as we have explored fully in the section entitled 'Causation', that the most proximate cause of the loss in the instant case is:

(a) the waiver of the relevant conditions precedent by MIBB in its capacity as lead arranger and primary subscriber whereby the business proceeds of the catalyst recovery business were no longer directly payable to the revenue account but remained in the control of AEM and then Aldwich with relevant undertakings to pay the monies into the revenue account, rather than ensuring that actual ring-fencing was in place, as represented to the prospective subscribers and the SC under the IM; and

(b) the failure to ensure that the counterparty contracts between AEM and business third parties were novated to Aldwich and the proceeds from such business contracts assigned directly to the revenue account over which MIBB, the lead arranger had sole control. That omission resulted in monies being held by AEM or transmitted to Aldwich and left in their control, which was effectively that of Kamalul, rather than the monies being directed to the revenue account to ensure priority of payments were adhered to.

[281] As such it cannot be said that the proximate cause of the loss was AEM, Aldwich and Kamalul. They are the parties who wrongfully siphoned off and

utilised the monies as found by the learned judge. To that extent the loss is directly attributable to them and they were found to be directly liable to return the entirety of the monies. But they could not have procured access to the monies but for the failure or omission of MIBB to act in accordance with its duties under the bond contracts and in accordance with the representations in the IM.

[282] The trial judge in concluding that the proximate cause of the loss was MIBB cannot therefore be faulted. More importantly it cannot be said that the trial judge contravened the doctrine of stare decisis in arriving at her decision because she applied the principle of law in relation to proximate cause in the same manner as the Federal Court did (in any event that is not the ratio decidendi of the case.)

The finding of the Federal Court in the case of *Pesaka* on the important notice in the IM

[283] The nub of the Federal Court's judgment and in our view the ratio of the case lies in the following passage:

> The information memorandum (IM) is not a contractual document as it is issued to provide information to potential investors. Since the IM is not a contract or an agreement, it does not have to comply with section 65 of the Securities Commission Act (SCA) 1993 which provides that 'An agreement is void in so far as it purports to exclude or restrict the liability of a person for contravention of section 55, 57 or 58 or for loss or damage under section 153'. Since the IM does not have to comply with section 65 SCA, the lead arranger is at liberty to include the important notice as a disclaimer in the IM. In any case it is common practice in other jurisdictions. The important notice must be given effect and is not void. Therefore the lead arranger does not owe a duty of care to the bondholders.

[284] From the passage it is clear that the Federal Court held that:

(a) an IM is not a contractual document;

(b) s 65 of the SCA 1993 is inapplicable to an IM because s 65 applies to agreements;

(c) as s 65 is inapplicable to IMs, a lead arranger may include the important notice as a disclaimer in the IM; and

(d) he important notice is not void and ought to be given effect.

[285] In the instant case and appeal, s 65 of the SCA 1993 does not feature. The bondholders do not found their case on s 65, nor on the basis that the IM is a contractual document.

[286] On the contrary the thrust of the bondholders' case is that a statutory breach has been occasioned under, inter alia, s 38(3) coupled with s 57 of the SCA 1993. As explained at the outset, s 38(3) affixes liability for material omissions or false or misleading statements in the IM by a 'person' or his 'agent'; while s 57 allows recovery of losses suffered from, inter alia, principal adviser where the loss suffered arose as a result of such false or misleading statement in the IM or for any material omissions from the IM.

[287] The claim by the bondholders for loss and damage is premised on a breach of an express provision of the SCA 1993 for which statutory redress is provided in express terms as set out in s 57.

[288] It is to that extent entirely distinguishable from the *Pesaka* case where no focus was placed on these particular provisions. The statutory provisions relied upon here are premised on the fundamental importance of complete disclosure to all investors, albeit sophisticated investors or ordinary investors. That is why, despite the bondholders being sophisticated investors, they were still statutorily protected under the SCA 1993 (as they are now under the CMSA 2007).

[289] The rationale underlying such protection is that all investors have the fundamental right to truthful and accurate disclosure of all material facts so that they can go on to make a decision as to whether or not to invest or subscribe in the subject bonds. Even sophisticated investors are entitled to the truth in terms of the investment they are about to embark upon.

[290] While they may have the requisite facilities to make enquiries of other professionals, any such assessment, sophisticated as it might be, is premised on a set of basic facts, the truth of which cannot be in doubt. Otherwise the assessment will be flawed. That is why the SC penalises untruthfulness or material omissions for all levels of investors. And this is evidenced by s 38(3) which gives an IM the same protection as a prospectus in relation to the truth of the statements made there, and to the extent of the information provided. Withholding material information is akin to making a false or misleading statement because that omission in itself, gives a completely different picture once it is included in the IM.

[291] And that perhaps is the crux of this case which takes it out of the sphere of *Pesaka* and the important notice. In the instant case MIBB was both the lead arranger and subscriber. It was both the principal adviser and the first purchaser of the entirety of the bonds.

[292] MIBB chose and deliberately decided, prior to the issuance of the IM, the bonds, and in contravention of the SC approval, to:

(a) alter materially the structure of the bond scheme such that the ring-fencing security features were jeopardised irrevocably;

(b) this took the form of waiving material CPs and executing supplemental agreements to vary the design and structure of the Aldwich Bond Programme; and

(c) with this express knowledge of the substantive changes it had invoked, MIBB nonetheless did not disclose these material changes to either:

(i) the SC; or

(ii) in the IM which would be relied upon by prospective subscribers.

[293] These acts of MIBB were deliberate and amounted to a calculated decision to conceal relevant and crucial material from the said parties. In these circumstances can it be said that the intent and purport of the important notice is to protect and absolve deliberate statutory breaches which carry serious penalties and comprise offences potentially punishable by fines and/or imprisonment?

[294] The clear answer is that the 'important notice' cannot do so because it would have the effect of rendering the statutory provisions of the SCA 1993 nugatory and impotent. It cannot have been the intention of Parliament that the protection afforded by these provisions of the SCA 1993 could be circumvented by the insertion of a mere disclaimer, no matter how widely worded it might be.

[295] The long title of the SCA 1993 indicates it was passed for the purpose of establishing the SC and matters incidental thereto. Section 15(1)(g) and (1)(i) respectively indicate that the core functions of the SC include:

(a) taking all reasonable measures to maintain the confidence of investors in the capital market by ensuring adequate protection for such investors; and

(b) to suppress illegal, dishonourable and improper practices in dealings in the capital market, and the provision of investment advice or other services relating to the capital market.

[296] It therefore stands, as indicated at the outset of this judgment, the SCA 1993 was passed with the express purpose of protection of investors, in the capital markets industry. This is one reason why the IM is accorded a status equal to a prospectus. In emphasising the paramountcy of the SCA 1993, we are fortified by the ratio in the Federal Court decision of *SEA Housing Corporation Sdn Bhd v Lee Poh Choo* [1982] 2 MLJ 31 where it was emphasised that provisions drafted into a contract have to be consistent with the relevant

governing statute. In that case the issue concerned the insertion in a contract of provisions which sought to avoid the provisions of the Housing Developers (Control and Licensing) Act 1966. It was held that the clause was ineffective vis a vis the contracting parties.

[297] Thus, in light of our observation that the SCA 1993 was passed to protect capital markets, we do not see how MIBB, by way of the important notice, purported to 'contract out' of its core obligations of continuous disclosure under s 38(3) of the SCA 1993. Accordingly, we see no merit in what is essentially MIBB's attempt at disguising its failure to disclose in the IM material facts as amounting to a mere 'omission', and then relying on the important notice to avoid liability and relying on the decision of the Federal Court in *Pesaka* to do so.

[298] Two further matters warrant comment. In light of what we articulated immediately above, we read the Federal Court's decision in *Pesaka* as holding that the disclaimer ought to be given effect as a defence to contractual obligations and tortious breaches. It does not state that the important notice is a panacea to all acts and omissions, including statutory breaches.

[299] Therefore, *Pesaka* is certainly not authority for the proposition that deliberate and calculated acts and omissions by a person, which put prospective subscribers at risk prior to the issuance of the bonds, are absolved by the disclaimer. It is inherent or innate to the construction of any such disclaimer that the disclaimer covers losses occasioned by inadvertent acts or omissions in contract or tort, or the inherent risk of an investment, are not actionable against the primary actors, such as the lead arranger. It is both untenable or inconceivable that a disclaimer such as the important statement in the IM can be construed or utilised to protect or absolve:

(a) a deliberate act of misrepresentation; or

(b) a deliberately misleading or false statement

occasioned by the wilful non-disclosure of material information.

[300] As stated above, if such a construction is accorded to false and misleading statements in the face of ss 38(3) and 57 it would render those sections meaningless.

[301] In any event the current s 256 of the CMSA 2007 extends the scope of s 65 of the SCA 1993 from solely contracts, to include documents and prospectuses. The net effect is that any document or prospectus (which would include an IM) that seeks to exclude or restrict liability for the contravention of the statutory provisions of the CMSA 2007, is void.

[302] Finally the omissions occasioned in *Pesaka* were held to be attributable to the acts of the trustee post issuance of the bonds when there was a failure to ring-fence the designated accounts. It did not deal with a deliberate misrepresentation occasioned by the principal adviser with a view to concealing a material alteration to the structure and design of the Aldwich Bond Programme. In this context it is pertinent that the full purport of s 38 particularly ss 38(3) and 57 do not appear to have been brought to the attention of, or emphasised in that case. Accordingly the Federal Court did not comment upon or deal with the prospectus-type liability imposed upon parties who insert false or misleading statements in an IM. Neither was the import of s 153 discussed.

The doctrine of stare decisis is not applicable

[303] Earlier in our judgment, we hold that the case of *Pesaka* is wholly distinguishable from our present case, inter alia, because that case concerned s 65 of the SCA 1993 which does not feature in our present case. The doctrine of stare decisis is not applicable here as we have distinguished the case of *Pesaka.*

The decision in *JP Morgan Chase Bank and others v Springwell Navigation Corp* [2008] All ER (D) 167 (Jun) ('the JP Morgan Chase case')

[304] MIBB and Mayban Trustees also rely on the foregoing case to maintain that the important notice and disclaimer absolve these entities from liability (EY also relies on this case in their written submissions). The case is distinguishable from the present case.

The background facts of the *JP Morgan Chase* case

[305] Springwell Navigation Corp ('Springwell') was incorporated specifically so that it could be the investment vehicle of the Polemis group.

[306] Springwell was beneficially owned by Adamandios Polemis ('AP'), his brother Spiros Polemis ('SP') and their mother, who was the widow of the founder of the current group, the late Mr Leonidas Polemis.

[307] Springwell had no employees. From 1990 until 1998 the management of Springwell, including the decisions about its investments, were largely those of AP alone.

[308] After the Russian default as a consequence of the Russian financial crisis in the summer and autumn of 1998, SP took over the principal management of Springwell and its claim against Chase.

[309] Springwell filed an action against various entities in what was then the Chase Manhattan Bank and is now JP Morgan Chase Bank (collectively called 'Chase'). In the trial before Gloster J, Springwell claimed over US$700m in damages, alleging that Chase had breached various contractual, tortious and fiduciary duties in advising on the nature and contents of Springwell's investment portfolio as a whole, which included not only Russian securities but also those of other 'emerging market' countries (collectively known as the 'pre-default claims').

[310] Springwell's appeal before the Court of Appeal concerned claims that Chase, through its employee Mr Justin Atkinson ('JA') had made specific misrepresentations as to the nature of the GKO LNs in the course of telephone conversations with AP, in particular between March 1997 and July 1998. Springwell asserted that it was induced to invest in GKO LNs by these misrepresentations, thereby incurring loss in respect of the 11 GKO LNs it held when the Russian moratorium was announced on 17 August 1998 and which subsequently defaulted. At the trial and on appeal this claim was called the 'Misrepresentation Claim', although that term embraces claims both under s 2 of the Misrepresentation Act 1967 and for alleged negligent misstatement by JA to AP.

[311] The second specific aspect on which permission to appeal was sought concerned the claim that Chase failed in its duty to Springwell to obtain some value from the forward currency contracts attached to the GKO LNs in the period after the Russian default. That was the most important of the four post-default claims that had been advanced at the trial.

[312] JA specialised in sales of emerging market securities and instruments which he sold to Chase's non-private (ie non-consumer) clients, such as Springwell. All the sales/purchases of the GKO LNs which are the subject of the appeal were made during telephone conversations between JA and AP. Those telephone conversations were regular and often long. From May 1997 they were tape-recorded.

[313] Gloster J in the Queen's Bench Division, Commercial Court, made specific fact-based findings. Her comprehensive judgment is best read in full. We conclude that the decisions by the trial judge and the Court of Appeal in the *JP Morgan Chase* case above hinged mainly on the findings that:

(a) JA provided investment advice on the understanding that AP made his own decisions and JA's recommendations were made on a personal basis, being more of opinions than recommendations;

(b) AP was a sophisticated investor and Springwell was an aggressive investor which was prepared to buy riskier investments;

(c) the exclusion clauses operated to preclude Chase owing Springwell a duty of care; and

(d) force majeure also played a role because no one could have predicted the consequences of the Russian default on the facts available to them.

[314] We can therefore distinguish the *JP Morgan Chase* case from ours in relation to Mayban Trustees on the following basis:

> Mayban Trustee is a professional trust corporation which the case of JP Morgan Chase did not concern. There was no conclusion of any trust in that case, let alone consideration of the potential liability of a professional trustee. More significantly it is in direct contrast to the issuance of securities, namely bonds under the SCA in Malaysia, where the nature of the investment, the instrument and significantly the statutory requirements differ considerably. Here the SCA imposes clear statutory burdens on MIBB (and the other agents, such as MTB and EY).

[315] In relation to MIBB, the JP Morgan Chase case is distinguishable from ours on the following basis:

> The case against Chase was premised on the conduct/actions of their employee, JA who was a salesman and who dealt with AP, the investor. His role in the transaction is entirely different from MIBB which we have stated above to be the adviser, lead arranger, facility agent, security agent and project agent of the bond programme, besides being a primary subscriber of the bonds. The duties owed by MIBB to the bondholders would necessarily be of a different nature and of a higher standard of duty of care as opposed to Chase's employee, JA, who was found by the trial judge and Court of Appeal to have offered opinions to AP the investor on the basis we have summarised above.

[316] We are also of the view that EY cannot rely on the *JP Morgan Chase* case because EY's liability arises in relation to their role as auditors of the Aldwich bond programme, but since the *JP Morgan Chase* case did not concern auditors, it is distinguishable from EY's situation. We will discuss EY's liability below when we consider EY's three appeals. At this juncture it will suffice to say that EY's liability is premised on statutory breach of duties and obligations imposed on them by virtue of the SCA 1993 (now the CMSA 2007).

[317] In all these circumstances, and at the risk of repetition, we are of the considered view that the instant appeal is distinguishable from *Pesaka* on the very different facts of this case, as well as the provisions of the law. Accordingly, given the ratio of *Pesaka,* we do not think the trial judge transgressed the doctrine of stare decisis. We are certainly in like manner bound, but for the reasons set out above most respectfully distinguish the present appeal from both the facts and the ratio of *Pesaka.*

[318] In conclusion we respectfully concur with the trial judge that both the decision in *Pesaka* and the important notice did not afford any tenable defence to MIBB. That ground of appeal is therefore without merit too.

[319] For the various reasons set out in our subheadings in relation to MIBB's appeal, we are of the view that the trial judge made no appealable errors in fact or law (in relation to liability) and therefore conclude that their appeal in Appeal No W-02(NCC)(W)-1699–08 of 2017 stands dismissed (the issue of quantum and the extent of liability is dealt with separately at the end of the appeals brought by the appellants on liability).

(B) THE APPEAL BROUGHT BY MAYBAN TRUSTEES IN APPEAL NOvW-02(NCC)(W)-1696–08 OF 2017

Section 82 of the SCA 1993 — Does a Statutory Breach Afford a Cause of Action to Mayban Trustees in Relation to the Aldwich Bond Programme?

[320] The bondholders brought their claim against Mayban Trustees premised on contract, tort and statutory breach. In relation to the SCA 1993, the cause of action premised on statutory breach turned on s 82. In this appeal Mayban Trustees raised a ground of appeal against the findings of the trial judge against Mayban Trustees, on the basis of breaches of s 82 of the SCA 1993. The basis for doing so was that s 82 was inapplicable to the Aldwich Bond Programme premised on s 66(2) read with paras 5, 8, 12 and 13 of Schedule 5 of the SCA 1993. It is contended that s 66(2) when read together with the relevant parts of Schedule 5 of the SCA 1993 suspends the application of the specific sections of Division 4 of Part IV of the SCA 1993, including s 82.

[321] The bondholders maintain that it is unfair and prejudicial of Mayban Trustees to raise this issue at this juncture not having done so at the High Court level. Neither had Mayban Trustees at any stage disputed that s 82 is applicable. In essence the bondholders' objection to the raising of this legal issue is that Mayban Trustees is 'estopped' or precluded by its conduct from pursuing the inapplicability of s 82 of the SCA 1993 in the present appeal.

[322] In the first place the basis of Mayban Trustees' submission on the inapplicability of s 82 is not explained nor analysed by solicitors for Mayban Trustees. The provisions have simply been reproduced and the general statement made that the obligations under s 82 of the SCA 1993 cannot be imposed as such obligations do not apply to the issuance or offers of subscription or purchase of the Aldwich Bond Programme to the bondholders. That is all. There has been no correlation made between items 5, 8, 11 and 12 and the bondholders here. By way of example:

[323] Section 82 is stated to be inapplicable to an issue of, offer for subscription or purchase of, or invitation to subscribe for or purchase debentures made to a person licensed as a fund manager under the Securities Industry Act 1983 or any person declared to be an exempt fund manager under that Act. There has been no submission as to which of the bondholders falls within that category. As such it is not possible to ascertain whether or not s 82 is applicable or not by virtue of s 66(2).

[324] The same approach has been adopted with all the other clauses relied upon in Schedule 5. As such, Mayban Trustees' submission appears to be an incomplete one. In these circumstances it is difficult for this court to rule one way or another. It appears to us that this is a matter of importance and relevance to this appeal. It is a question of law whether or not s 82 applies to the Aldwich Bond Programme. It goes to the heart of whether or not a claim premised on statutory breach under s 82 of the SCA 1993 can be brought against Mayban Trustees

[325] The bondholders have also not responded to this challenge, notwithstanding that it is taken up at this the appellate level. This issue ought to have been fully clarified to enable the court to make a clear determination either way.

[326] As matters stand, this court is left in the exceedingly unenviable position of having to consider matters on the basis of s 82 being inapplicable or alternatively applicable.

[327] Section 82 of the SCA 1993 sets out the duties of trustees or a trustee of a trust deed that is entered into under s 67 of the SCA 1993. It then goes not to set out the duties in considerable detail commencing with the need to exercise reasonable diligence in relation to the assets and security of the borrower and whether it will be sufficient to meet the liabilities when they are due; consonance amongst the prospectus and the trust deed and bond contracts etc.

[328] What is apparent is that for the provisions of s 82 to apply the trust deed must be one which is entered into under s 67 of the SCA 1993.

[329] Section 66(2) of the SCA 1993 provides that Division 4 of Part IV as specified in Schedule 5 shall not apply to any issue of, offer for subscription or purchase of, or invitation to subscribe for or purchase, debentures specified in Schedule 5. 'Debentures' is defined to include bonds. Schedule 5 in turn refers to issues of offers for subscription or purchase of debentures to which various sections including s 82 of Division 4 of Part IV do not apply.

[330] The list in Schedule 5 includes entities in respect of which an offer for the subscription of debentures including bonds to which s 82 (being a part of Division 4 Part IV) have no application.

[331] If indeed s 82 is inapplicable as submitted by Mayban Trustees, then s 82 cannot found a tenable cause of action against Mayban Trustees. If indeed the bondholders fall within any of the categories specified in Schedule 5 then the arguments raised by the bondholders in their submissions based on estoppel are not available to preclude Mayban Trustees from raising what in effect is a point of law going to jurisdiction at this, the appellate level (see *Ruslan Baharin Industries Sdn Bhd & Ors v Government of Malaysia* [2009] 5 MLJ 63; [2010] 7 CLJ 713). Jurisdiction is not conferred by estoppel or conduct, where it does not exist.

[332] However what is clear is that the trial judge cannot be faulted for proceeding on the basis that s 82 was applicable because none of the counsel in these proceedings appears to have realised the alleged inapplicability of the section.

[333] We now proceed to consider the appellant Mayban Trustees' grievances on the basis that s 82 is in fact inapplicable.

The appellant, Mayban Trustees' grievances

(a) Mayban Trustees maintains that the trial judge erred in finding that Mayban Trustees' involvement commenced at the pre-bond issuance stage. It contends that it only became involved after or post-bond issuance. Accordingly it is submitted that it cannot be held liable for any issues or incidents arising pre-bond issuance;

(b) the trial judge erred in finding that Mayban Trustees had an overriding duty to monitor the implementation of the bonds when there were no specific provisions to that effect in the trust deed or the bond contracts;

(c) the trial judge erred in finding that Mayban Trustees failed to act with reasonable diligence when it had in fact done so;

(d) it had no duty to monitor the failure of the issuer, Aldwich to credit the revenue and cash flow proceeds as required, particularly as it had no access to the designated accounts;

(e) there was no delay nor failure to notify the SC in view of such notification being effected on 5 November 2009;

(f) there was no evidence of 'Trustee Default' in the instant case; and

(g) causation was not examined, analysed or established. In this context the

'but for' test was not satisfied. The causal link to the bondholder's loss is the business failure of Aldwich.

OUR ANALYSIS

The role and function of the Bond Trustee, Mayban Trustees in the Aldwich Bond Programme

[334] The trust deed is a bilateral deed between the issuer, Aldwich and the trustee, Mayban Trustees. The trustee is not an agent of the issuer, but an independent institution, that acts on behalf of the bondholders. It was appointed by Aldwich.

[335] Under the common law, the trustee owes the bondholders a duty of care, the standard of which is necessarily a higher one (see *Bartlett and others v Barclays Bank Trust Co Ltd (Nos 1 and 2)* [1980] Ch 515 at pp 534–535 on liability of a professional corporate trustee.)

[336] The use of a bond trustee is to make the functioning of the bond programme easier for both the Issuer and the bondholders. In this context, it is important to appreciate that the trustee Mayban Trustees represented the bondholders, as has been specifically stated in the trust deed. If that were not the case, the bondholders would be placed in a direct contractual relationship with Aldwich, which would be inconvenient, costly and difficult to administer. The party holding the bond enjoys the right to receive payment on it and to sue the issuer, if the terms of the bond are not complied with. On default it would then be incumbent upon each of the bondholders to take individual action against the issuer. This again would be disorderly and inconvenient. This is why a professional trustee, such as Mayban Trustees was chosen to undertake these duties collectively for the bondholders and on their behalf.

[337] A key component of Mayban Trustees' duties therefore included the duty to monitor Aldwich's performance under the bond structure. In order to so monitor and regulate, it follows that Mayban Trustees ought to have been conversant with the terms and conditions of not only the trust deed but also the bond contracts and the structure of the Aldwich Bond Programme.

[338] In the present context therefore, the duty fell on Mayban Trustees to undertake all these duties and obligations on behalf of the bondholders, whose interests it was bound to secure and protect. Mayban Trustees was therefore bound, under the terms of the trust deed to 'police' or monitor or regulate the issuer, Aldwich's compliance with the terms of the bonds and other relevant bond contracts where Mayban Trustees is mentioned.

[339] Upon default or a failure in compliance being noted, at the earliest opportunity, it was incumbent upon Mayban Trustees to alert the bondholders so that they could decide (vide a specified majority) on a joint course of action and instruct the trustee accordingly. This was not done until some six years later in the instant case.

The nature of the relationship between the trustee, the issuer and the bondholders

[340] Aldwich, as the issuer and Mayban Trustees as the trustee entered into the trust deed so as to constitute the bonds, appoint Mayban Trustees as a fiduciary of the bondholders and set out Mayban Trustees' rights, obligations, powers, discretions and protections with respect to the bonds and its role as trustee. It is important to note that the trustee therefore stands in the position of a fiduciary to the bondholders.

[341] Aldwich as the issuer covenanted directly to Mayban Trustees as the trustee relating to the bonds (eg the covenant to repay principal and pay interest on the bonds), and in turn, Mayban Trustees as trustee held these covenants on trust for the benefit of the bondholders. The covenants will be considered in greater detail below.

Trustee obligations under the trust deed

[342] Mayban Trustees on behalf of the bondholders was given certain rights to obtain information (in the form of information covenants) from the issuer and was therefore in a better position than the bondholders to monitor Aldwich's compliance with these covenants, to identify a breach, and to notify other stakeholders in order to take appropriate action. It bears repeating that Mayban Trustees as trustee was bound to perform the role of a fiduciary between the issuer and the bondholders and between the bondholders themselves.

The specific terms of the trust deed between Aldwich and Mayban Trustees

[343] The trust deed was executed between Aldwich and Mayban Trustees on 22 May 2003 in relation to the senior bonds of an aggregate nominal value of RM293m.

[344] As explained above, the positive covenants given by the issuer, Aldwich were to enable Mayban Trustees to perform its duty of ensuring compliance with the terms of the trust deed, compliance with the Aldwich Bond Programme and other related bond contracts to which Mayban Trustees was privy.

[345] A perusal of the positive and negative covenants undertaken by Aldwich in the trust deed, by implication conferred a corresponding duty on the trustee to monitor or regulate adherence or obedience to these covenants, on behalf of the bondholders. In so doing Mayban Trustees had corresponding duties in contract, tort and trust to monitor and regulate performance on behalf of the bondholders. Mayban Trustees was therefore accorded access to information for a specific purpose namely to monitor and regulate on behalf of the bondholders. *On a perusal of the evidence given on behalf of Mayban Trustees by Tan Kah Yin it does not appear that Mayban Trustees performed its duties of ensuring compliance for and on behalf of the bondholders.*

Specific provisions of the trust deed

[346] Mayban Trustees was empowered under cl 9.1 (c) to require an examination of the books and accounts of Aldwich with proper notice. This envisaged that monitoring of the accounts of Aldwich was an obligation Mayban Trustees was bound to perform. There is no evidence on record to establish that Mayban Trustees did so.

[347] Similarly cl 9.1(h) and (i) required Mayban Trustees as the trustee to be aware of the audited accounts of Aldwich. In other words, the state of solvency was a fact that Mayban Trustees was duty bound to have knowledge of. This in turn was only possible if Mayban Trustees perused or considered the audited accounts periodically. The evidence does not disclose that Mayban Trustees did so.

[348] More pertinently cl 9.1(dd) required Aldwich to maintain and cause all payments to be made into and out of the designated accounts in accordance with the cascading waterfall structure. Mayban Trustees was therefore under a duty or obligation to ensure that all of Aldwich's payments were in fact made into and out of the designated accounts in accordance with the transaction documents, essentially in accordance with the waterfall cascading priority prescribed. This was matched by negative covenants given by Aldwich to the trustee in cl 9.1(ww) not to pay or allow monies to be paid out of the designated accounts save as prescribed without the prior written consent of the trustee.

[349] While compliance with payments in and out of the designated accounts in accordance with the waterfall cascading structure may have been the primary duty of MIBB, the fact that the monitoring of such payments is expressly provided for in the trust deed (and the assignment and charge agreement (but Maybank Trustees is not a party to the assignment and charge)) underscores that it was also the duty of Mayban Trustees to ensure compliance. There is insufficient evidence to establish that Mayban Trustees undertook or performed this compliance duty.

[350] Similarly cl 9.1(kk) also envisaged that Mayban Trustees as trustee would as necessary, inspect the books and accounting records of Aldwich to ensure that it was solvent. There is no evidence on record to establish that this duty was performed by Mayban Trustees.

Clause 9.2 (a) and (b) imposed upon Aldwich a duty to deliver an annual budget and the details of the same. Mayban Trustees was under an obligation to ensure that this was complied with. The evidence of Tan Kah Yin establishes that this was not done. According to the GOJ para 170, the cross-examination of Tan Kah Yin established that Mayban Trustees was unaware of its obligations when it received letters from EY (through Aseam) pertaining to the DSCR and annual budget.

[351] However according to the GOJ para 168, Tan Kah Yin's evidence reveals that Mayban Trustees was aware of its duties under the Trust Deed including under cl 9.2, their duty with regards to the annual budget and annual projected cash flow statement). Tan Kah Yin agreed this is confirmed by the Mayban Trustees' letter dated 5 December 2008 to Aldwich reminding Aldwich 'In the meantime, would appreciate if you could adhere and made reference to all the covenants stipulated under the abovementioned Trust Deed as part of compliance requirements.'

Specific exemption of liability clauses

[352] Clause 21 sets out the trustee's rights and powers additional to those contained under the Trustee Act 1949 and the general law.

[353] Clause 21.8 provides that the trustee is not bound, subject to cl 21.9 to enquire whether the provisions of any transaction document have been complied with.

[354] It is also expressly provided in cl 23 that the trustee is not concerned with or responsible for any omission from or statement contained in the IM.

[355] Clause 26 of the trust deed also exempts the trustee of liability otherwise than due to a trustee default.

[356] The Federal Court has recently held that in light of s 29 of the Contracts Act 1950, one cannot absolutely exclude liability through an exemption clause. Whether or not an exemption is absolute turns on the proper construction of the exemption clause and the document as a whole (see *CIMB Bank Bhd v Anthony Lawrence Bourke & Anor* [2019] 2 MLJ 1; [2019] 2 CLJ 1 at paras 31 and 38.)

[357] Taking heed of the method suggested by the Federal Court, we turn to consider the provisions of the trust deed. From a reading of cl 21.17 of the trust deed, it is plain that there was never within the contemplation of parties to grant Mayban Trustees an absolute exemption of liability. For ease of reference, that clause reads as follows:

> Nothing in this Trust Deed or the Bonds should be construed as relieving, exempting or indemnifying the Trustee from liability for:
>
> (i) (i) A Trustee Default; or
>
> (ii) (ii) Failure to show reasonable degree of care and diligence required of it as a trustee.

[358] The relevant portions of cl 1.1 of the trust deed define trustee default to mean any act or omission of, inter alia, of the trustee which amount to negligence, a breach of the trustee's duties as a trustee or a breach of trust, or a breach of the trustee's obligations under any transaction document to which the trustee is a party or a breach of the SC Act or any other laws or fraud.

[359] Further, cl 21.9 provides that the trustee is bound to exercise reasonable diligence at all times, based on the accounts and other documents coming to its notice, to ascertain whether Aldwich had committed any breach of the terms and conditions of the bonds or provisions of the trust deed or whether a trigger event or an event of default had occurred or was continuing. The trustee was then bound to exercise such rights and powers as conferred by the trust deed and use reasonable skill and diligence in exercising its powers. The evidence of Tan Kah Yin evidences that this was not done for some six years and only towards the end near final default.

Does liability of Mayban Trustees arise pre- or post-issuance of the bonds?

[360] The trial judge concluded on the basis of s 82 of the SCA 1993 that Mayban Trustees' duties arose post-issuance. As s 82 is inapplicable this finding is not entirely accurate but only by reason of reliance on the said section. However this does not automatically mean that Mayban Trustees had no duties or obligations until bond issuance. As of the date of execution it was acting for and on behalf of and for the benefit of the bondholders. To that extent it can be said that it was duty bound to comprehend the design and structure of the Aldwich Bond Programme.

[361] If this had been undertaken, then it would or ought to have been clear to Mayban Trustees that the Aldwich Bond Programme had deviated considerably from its original design and security features to a varied version whereby AEM and Aldwich would continue to have direct access to business proceeds. This would have alerted a prudent professional trustee that there was

an added onus to ensure that the proceeds be remitted to the designated accounts as required. Mayban Trustees ought to have been alerted as to the importance of its compliance duties under the trust deed. This is because of the nature of its primary duty, namely to protect and act in the interests of the bondholders.

[362] As such, it cannot be stated that Mayban Trustees' duties and obligations only arose after the issuance of the bonds.

[363] In the instant case, as we have outlined above in relation to the evidence of Tan Kah Yin, it is clear beyond doubt that Mayban Trustees was unaware of the changes to the structure and design of the Aldwich Bond Programme pre-bond issuance and the disparity between the IM and the trust deed (which makes specific reference to the two BSAs). Mayban Trustees' witness admitted that he only became aware of the BSAs some six years later. As such, Mayban Trustees was unaware that the security ring-fencing feature had been effectively diluted or destroyed by the substantive variations introduced by MIBB.

[364] As the trustee acting on behalf of the bondholders it was open to Mayban Trustees to bring the existence of the Supplemental BSAs to the attention of the bondholders. In this context there is no necessity to make reference to s 82 of the SCA 1993, which confers a statutory obligation on Mayban Trustees. Such a duty is conferred upon Mayban Trustees under the trust deed and by virtue of Mayban Trustees' fiduciary role vis a vis the bondholders.

[365] Applying the term 'reasonable diligence' which appears in the trust deed or the relatively low objective standard of the prudent businessman entrusted to take care of third parties' financial interests, it would follow that Mayban Trustees' failure to even have cognisance of the substantive and damaging variation to the Aldwich Bond Programme which would directly affect the bondholders' interests, amounts to a breach pre-bond issuance. We are therefore unable to agree with learned counsel for Mayban Trustees' submission that its liability only arose post-bond issuance.

Standard of care

[366] The trial judge applied a higher standard of care than that normally applied for a trustee, namely that of a prudent businessman exercising reasonable skill and diligence on the grounds that Mayban Trustees is a professional trustee corporation. As a professional entity it was held, it was expected that Mayban Trustees would possess a higher degree of skill and expertise than the ordinary businessman and therefore exercise a higher level of skill and diligence. In doing so Her Ladyship relied on *Bartlett and others v*

Barclays Bank Trust Co Ltd (Nos 1 and 2) [1980] Ch 515 where it was held, inter alia, that 'A higher duty of care is plainly due for someone like a trust corporation which carries on a specialised business of trust management'.

[367] We find no reason to disagree with Her Ladyship's reasoned finding in law.

[368] In determining the appropriate standard of care, regard ought to be accorded to the terms of the trust deed and case-law, apart from the provisions of the Trustee Act 1949. The standard term that consistently appears throughout the trust deed is that the trustee is expected to exercise 'reasonable diligence'. Any such reasonable diligence it would follow, is to be assessed according to the circumstances of the case. This was a bond issuance by Aldwich in 2003 which comprised a relatively simple model of repayment to the bondholders as originally conceived. As a professional trustee it would be expected that Mayban Trustees acting on behalf of the bondholders would exercise reasonable care to ensure that there was compliance with the model and repayments. The issue is whether it would be more than an ordinarily prudent person given its specialist expertise in this field.

[369] To our minds, to impose the general standard of diligence that a man of ordinary prudence would exercise in the management of his own affairs is somewhat low for a professional trust corporation. A man of ordinary prudence managing his own affairs might vary considerably from case to case in the management of his own affairs. It would require an exhaustive inquiry into the degree of care and prudence which he utilised in the management of his affairs. Any test to be applied must be objective. It should also not be applied with hindsight.

[370] We are of the considered view that the basic minimum standard cannot apply to each and every kind of trustee. As has been stated and adopted in numerous other jurisdictions a higher standard should be required of 'professional' trustees. This is because solicitors, accountants and banks generally represent themselves when offering trusteeship services that they offer a superior standard of service by reason of their specialised skill and expertise. Accordingly it is only fair that they are held to the standard that they have represented.

[371] In such cases the law specifies that a person who professes to have such a special skill or experience ought to display the same standard of care as other members of that profession. It is only if they act in a manner which no ordinary competent person acting with care would do, that negligence arises.

[372] On the foregoing basis, we are of the view that the trial judge was not wrong when Her Ladyship adopted the test she did. We would further add that an objective test of a reasonable trustee acting or using the same care and diligence as an ordinary prudent person of such skill and expertise would use in managing the affairs of others, would appear to be the ideal test. The 'others' here would be the beneficiaries. This would not amount to an impossibly high standard. It also relates the test to the property of others because it is in their interests that the trustee carries out his functions.

[373] Applying such an objective test, and without utilising hindsight as a basis to ascertain whether Mayban Trustees acted in accordance with its fiduciary duties or in accordance with its duty of care owed, it appears to us an inescapable/irresistible conclusion, that Mayban Trustees failed to adhere to this legal standard of care for the reasons we have detailed so copiously above (see also *Re Waterman's Will Trusts; Lloyds Bank Ltd v Sutton and Others* [1952] 2 All ER 1054).

Did Mayban Trustees breach its duties as fiduciary, under the trust deed? Was it negligent in the performance of its duties?

[374] We have set out the duties and obligations of Mayban Trustees under the trust deed in extenso in paras 340–345. Taking these provisions into consideration together with the oral evidence adduced at trial, it is evident from the evidential records relating to the evidence of Mayban Trustees' sole witness, Tan Kah Yin, that he accepted that Mayban Trustees had not performed its duties in accordance with the trust deed. This was the finding of the trial judge and we have no cause to interfere with Her Ladyship's sound finding.

[375] The witness accepted that compliance obligations were not undertaken. The witness admitted that Mayban Trustees was unaware as to the course of action it ought to have undertaken upon receipt of letters from various parties, like the auditors. The tenor of the evidence suggests that Mayban Trustees was not conversant nor comprehended the significance of its role, as trustee on behalf of the bondholders.

[376] It performed its obligations only after a six year hiatus in relation to express default when performance by Aldwich was virtually irredeemable. That, in fact, is precisely what a trustee is bound to ensure does not occur. In this context Mayban Trustees' stance that its duties are merely administrative and ministerial do not stand up to scrutiny in law nor under the express provisions of the trust deed, as we have outlined above.

[377] We can do no more than agree with the trial judge that Mayban Trustees failed to comply with its obligations and duties as there is as there is ample evidence on record to support such a contention. We so conclude on the basis of the duties outlined under the trust deed and bearing in mind that s 82 of the SCA 1993 does not come into play in this bond programme involving Aldwich by reason of s 66(2) and Schedule 5 of the SCA 1993.

[378] To summarise, Mayban Trustees merely assumed that the issuer complied with the provisions of the trust deed and the bond contracts without making any attempt to perform its duties to ensure compliance; more particularly it failed to detect that monies were not being remitted as required under the cascading waterfall system which comprises a part of its duties to ensure with reasonable diligence that Aldwich was not in breach of its obligations; Mayban Trustees did not carry out any form of due diligence in terms of books, accounts, auditing etc for six years or so; Aldwich's numerous breaches were only reported to the SC very late in the day, to the detriment of the bondholders.

[379] We have also taken into consideration the various duties as outlined in the trust deed which were simply ignored.

[380] In determining that Mayban Trustees breached its duties and was negligent, we have applied the legal standard of care as set out above. We are satisfied that apart from setting aside the findings of the High Court made in relation to s 82, the trial judge was correct in her findings of fact in relation to the failure of Mayban Trustees to undertake its obligations.

[381] Even if it is argued that Her Ladyship's findings are inextricably intertwined with s 82, we have as an appellate court, reviewed the findings in the context of the entirety of the evidence before the court and concluded that the findings of a breach of duties owed to the bondholders under the trust deed and in breach of the duty of care owed to the bondholders are fully made out.

[382] Lest it be said that we have conflated the separate causes of action in trust and negligence it ought to be made clear that the latter cause of action is made out because:

(a) Mayban Trustees owes a duty of care to the bondholders as it acts on their behalf to protect their interests. This is not a creation of a new cause of action. The relationship between Mayban Trustees and the bondholders is sufficiently proximate to enable such a duty of care to exist under the common law;

(b) the breach of duty has been canvassed extensively above; and

(c) it remains to be ascertained whether these breaches caused or contributed towards the losses suffered by the bondholders.

[383] That brings us to the issue of causation.

Causation

[384] Mayban Trustees, the appellant, complains that the learned trial judge failed to consider whether the breach of duties and/or negligence caused or resulted in the losses suffered by the bondholders. Mayban Trustees maintains that the trial judge did not undertake the specific exercise of ascertaining whether 'but for' these acts, the losses incurred by the bondholders would not have been sustained. Mayban Trustees points instead to the 'collapse' of Aldwich's WOR and Catalyst Recovery business as the primary or proximate cause of the loss. In these circumstances their submission is that the trial judge erred in finding Mayban Trustees liable to the extent it did, because such breaches (which are denied) did not cause the losses suffered. In other words, notwithstanding such breaches, the bondholders would still have sustained the losses by reason of the business failure of Aldwich.

[385] Applying the 'but for' test to the present appeal, the question that falls for consideration is:

> But for the breaches occasioned by Mayban Trustees, would the bondholders have sustained the losses they did under the Aldwich Bond Programme?

[386] In our considered view, causation is a question of law guided to some extent by common sense. In *Environment Agency (formerly National Rivers Authority) v Empress Car Co (Abertillery) Ltd* [1999] 2 AC 22 (HL) it was held:

> The first point to emphasise is that common sense answers to questions of causation will be differ according to the purpose for which the question is asked. Questions of causation often arise for the purpose of attributing responsibility to someone, for example, so as to blame him for something which has happened or to make him guilty of an offence or liable in damages. In such cases, the answer will depend upon the rule by which responsibility is being attributed. Take, for example, the case of the man who forgets to take the radio out of his car and during the night someone breaks the quarterlight, enters the car and steals it. What caused the damage? If the thief is on trial, so that the question is whether he is criminally responsible, then obviously the answer is that he caused the damage. It is no answer for him to say that it was caused by the owner carelessly leaving the radio inside. On the other hand, the owner's wife, irritated at the third such occurrence in a year, might well say that it was his fault. In the context of an inquiry into the owner's blameworthiness under a non-legal, common sense duty to take reasonable care of one's own possessions, one would say that his carelessness caused the loss of the radio... I turn next to the question of third parties and natural forces. In answering questions of causation for

A the purposes of holding someone responsible, both the law and common sense normally attach great significance to deliberate human acts and extraordinary natural events.

B **[387]** What Lord Browne-Wilkson, in our considered view means by the aforementioned passage is that the attribution of liability is done on the basis of common sense within the confines of the rule or law applicable — in this case — the trust deed.

C **[388]** It is undisputable that the loss of monies is directly attributable to Aldwich, AEM and Kamalul, as the evidence bears out the fact that up to/at least RM166m is unaccounted for from the books and accounts of Aldwich and AEM, both of whom were controlled by Kamalul. The monies were in the accounts of Aldwich and AEM and simply did not reach the designated
D accounts.

[389] As we have explained at some considerable length earlier, the most proximate cause of the loss in the instant case are the breaches occasioned by MIBB. How then can the losses sustained be attributable to Mayban Trustees?
E In point of fact the omissions of Mayban Trustees contributed in no small way to the losses eventually sustained by the bondholders.

[390] If Mayban Trustees had:

F (a) undertaken and performed its duties and obligations as it was bound to under the trust deed; and

(b) if it had comprehended the structure, design and security features of the Aldwich Bond Programme, particularly the variations effected which it was bound to given the contents of the trust deed; and
G

(c) acted upon or alerted the bondholders or taken any other steps to protect their interests,

H the losses suffered would have been limited or lessened. If Mayban Trustees had carried out its duty of checking on or regulating or monitoring the designated accounts or the flow of monies to and from Aldwich or to and from Aldwich to the revenue account, even periodically, it would or could have alerted the relevant parties such as MIBB or the bondholders.

I **[391]** The failure of Mayban Trustees to carry out its duties or the negligent omission to perform its duties exacerbated the losses suffered. Mayban Trustees contributed to the losses suffered by the bondholders. Therefore there is a

direct nexus between the acts and omissions of Mayban Trustees and the losses suffered. This is sufficient to meet and/or satisfy the 'but for' test in terms of contributory causation.

[392] In other words, notwithstanding that the most proximate cause of the losses suffered was MIBB, Mayban Trustees contributed or secondarily caused the bondholders to suffer those losses by failing to act as it had undertaken to do under the terms of the trust deed. The omissions are particularly glaring, given that Mayban Trustees is a professional trustee corporation.

[393] In these circumstances we are satisfied that Mayban Trustees also caused or contributed towards the losses suffered by the bondholders. Although the learned judge erred (for no fault of her own) in the application of s 82 of the SCA 1993, which precludes statutory liability, Mayban Trustees' liability under the trust deed and in negligence are fully made out.

[394] As such the apportionment of liability remains to be considered. The learned trial judge ascertained the percentage of liability to be 20 per cent. Although we have discounted liability under s 82 of the SCA 1993, we are satisfied that breaches under the other causes of action have been sufficiently made out. We have undertaken a review of the entirety of the evidence and the law. We are not inclined to tinker with the percentage of liability apportioned by the trial judge notwithstanding her erroneous application of s 82 of the SCA 1993 because the breaches have been fully made out under the trust deed and in negligence. Such liability is therefore affirmed at 20 per cent.

[395] We shall deal with the issue of quantum at the end of the judgment.

If s 82 is applicable, valid and binding to the Aldwich Bond Programme trust deed

[396] In the event s 82 is in point of fact applicable, valid and binding to the Aldwich Bond Programme, then the trial judge cannot be faulted in any manner for Her Ladyship's comprehensive and detailed findings on how Mayban Trustees failed to fulfil its obligations under, inter alia, s 82. The cause of action premised on s 82 of the SCA 1993 is then entirely well-founded too.

[397] We can only respectfully adopt and reiterate Her Ladyship's findings on this aspect of the contravention of s 82 by Mayban Trustees in its entirety. There is no reason for any appellate intervention in respect of the findings against Mayban Trustees in this regard.

[398] We would also adopt our reasoning in relation to causation here to conclude that Mayban Trustees contributed to, and thereby also caused the bondholders to suffer considerable loss by reason of their masterly inaction and clear omissions.

(C) APPEALS BY EY IN APPEAL NO W-02(NCC)(W)-1710–08 OF 2017, APPEAL NO W-02(NCC)(W)-2167–10 OF 2017 AND APPEAL NO W-02(NCC)(W)-2168–10 OF 2017

EY's submissions

[399] EY appealed against both the principal judgment of the learned trial judge dated 24 July 2017 as well as the ancillary judgments on consequential relief and costs and expert costs handed down subsequently on 5 October 2017.

[400] With respect to the principal judgment, EY's various grounds of appeal as set out in their submissions are as follows:

(a) the trial judge erred in law in finding that EY breached its statutory duties under the SCA 1993 (or the CMSA 2007);

(b) the trial judge erred in law in finding EY liable for the bondholders' losses on the basis of negligence. In this context EY maintains that the bondholders are contributorily negligent for the losses suffered; and

(c) the trial judge erred in assessing loss at RM177,248,747.31 as such loss was not proven by the bondholders. In this context the apportionment of liability to EY of 20 per cent is erroneous and unfounded.

[401] Each of these issues will be considered in turn.

Breach of statutory duties

[402] The bondholders alleged and the trial judge found liability against EY in respect of a breach of ss 32B, 38, 57, 85 or 153 of the SCA 1993. EY maintains that these findings are erroneous on primarily two grounds:

(a) EY does not owe any such statutory duty to the bondholders under these sections; the learned judge erred in her interpretation and application of each of the statutory provisions, namely ss 32B, 38, 57, 85 or 153 of the SCA 1993;

(b) the bondholders failed to plead these sections in their claim and therefore not entitled to proceed under these sections as the failure to plead liability under those sections is fatal; and

(c) the failed to consider or examine whether these alleged breaches of statutory duty caused the losses suffered by the bondholders.

Pre-bond issuance

[403] The trial judge found EY liable for breach of statutory duty under ss 38, 57 and 153 of the SCA 1993 on the basis that EY contributed information to the IM that was false, misleading or contained material omissions; additionally under s 32B in that EY failed to disclose in the IM the fact that AEM's business contracts could not be novated to Aldwich prior to bond issuance.

[404] The trial judge in relation to the pre-bond issuance duties of the auditor found that EY as a party who supplied information to be included in the IM was, by virtue of s 38 of the SCA 1993, under a continuing duty to ensure that all such information is not false or misleading or contains material omissions. Once such a continuing duty is established, s 57 makes it an offence to breach s 38. And s 153 goes on to impose liability on EY for losses or damage caused as a result of such breach of s 38.

[405] EY maintains that this conclusion is erroneous in law. It contends that s 38 of the SCA 1993 imposes no such duty on EY as auditor. The section, it maintains, only imposes liability on the person who issued the IM and its agent. It is submitted that a plain reading of the section does not allow for the imposition of liability on the auditor. It merely provides a mechanism by which liability may be imposed on the person who issues the IM or an agent who issues an IM meaning either Aldwich or MIBB, but not EY. Neither are any continuing duties imposed on EY.

[406] Secondly it is contended that the key words of s 38(3), namely 'an information memorandum issued by a person or his agent purporting to describe the business and affairs of the person ... shall be deemed to be prospectus in so far as it relates to the liability of the person or his agent for any statement or information that is false or misleading or from which there is a material omission' only impose prospectus-type liability solely on the person who issued the IM (or his agent). The section does not deem an IM to be prospectus for any other purpose. The construction therefore, it is contended, turns on the word 'issues' which can only mean Aldwich or MIBB as EY did not at any time 'issue' the IM. In this context reliance is placed on the definition of 'issue' in s 2(1) of the SCA 1993, which states that issue means '... to circulate, distribute or disseminate such notice, prospectus or document'.

[407] EY was at all times the 'reporting accountant' in the IM. Neither the SCA 1993, the Companies Act 1965 nor the common law deem a company's

auditor or reporting accountant an agent for the purposes of the issuance of an IM.

[408] Neither does s 38 impose any continuing obligation on any party, particularly EY.

Section 57 of the SCA 1993

[409] Following on from the imposition of liability under section 38, the trial judge found attendant liability under s 57 of the SCA 1993. Here again EY maintains that such imposition of liability by the trial judge for the recovery of loss or damage arising from false or misleading statements in a prospectus to be erroneous because, it is contended, such liability may only be imposed in respect of prospectuses in certain circumstances and not in respect of an IM. In short it is submitted that s 57 is clearly inapplicable, as borne out by the IM itself which stipulates that it is not a prospectus and not intended to be one.

Section 153 of the SCA 1993

[410] Similarly with respect to s 153 it is submitted that the section only comes into play when there has been a proven contravention of any provision of Part IV. In such instance only is loss and damage sustained thereby available to be recovered from the liable party. In this context EY maintains that as it has not breached any of the provisions of the Act, for the reasons stated above, s 153 simply has no application. Any such imposition was therefore a grave error which warranted intervention and overturning by this court. It was an error in law.

Pleadings

[411] EY rounds off its attack by pointing to the fact that the bondholders failed to specifically plead ss 38, 57 and 153 in their case against EY. As such it is maintained that these provisions ought not to have been considered by trial judge (see *Giga Engineering & Construction Sdn Bhd v Yip Chee Seng & Sons Sdn Bhd & Anor* [2015] 6 MLJ 449 ('Giga Engineering')). However, the case of *Giga Engineering* is distinguishable from our present case for the following reasons.

[412] In Giga Engineering, what the plaintiff failed to plead was relevant facts to particularise and establish fraud, equitable fraud or misrepresentation, not, as in the present case, material statutory provisions which establish civil liability for contravention of the SCA 1993 provisions (s 153), entitle the plaintiff to recourse for loss or damage resulting from false or misleading statement in

prospectus (s 57) and to endow the relevant authorities with powers of enforcement and investigation (s 38).

[413] The case of *Giga Engineering* therefore cannot stand for the proposition that the court is prevented from considering the abovementioned statutory provisions which were not pleaded.

[414] In essence the complaint is that EY is taken by surprise in that it is both unfair and prejudicial to them as defendants if the bondholders are not allowed to raise an issue that was not within the contemplation of the parties by reason of the omission in the pleadings.

[415] The pleadings are then considered in their entirety and the complaint is levelled that the foregoing sections are not or improperly pleaded.

Failure to provide reasoned findings

[416] The trial judge, it is complained, failed to provide adequate reasons for her findings of liability under ss 38, 57 and 153 of the SCA 1993. They were all considered in a single paragraph, namely para 252. Neither did the trial judge explain how the breach of statutory duty was occasioned in that Her Ladyship failed to establish that the injury suffered fell within the ambit of the statute, that such statutory duty was not fulfilled resulting in damage to the bondholders, and that the statute imposes liability to civil action.

Response from the bondholders to EY's construction of the relevant provisions of the SCA 1993

[417] The bondholders in response, set out the position in law in general terms under the SCA 1993. They maintain that on a proper construction of the SCA 1993 and the relevant provisions applicable to this appeal, there is provision for liability against auditors as advisors and on the facts of this matter, EY has breached its statutory duties.

Section 328 of the SCA 1993

[418] The bondholders submit that s 328 is clearly applicable by virtue of its express wording. Section 328 provides that an issuer, a financial adviser or an expert or any other person shall not submit or cause to be submitted any information required by the SC which is false or misleading or from which there is a material omission. This is further emphasised in the Guidelines on the Offering of the Private Debt Securities ('PDS Guidelines') which requires that anyone who issues or offers bonds for sale in Malaysia. As such, EY falls within

its purview by virtue of being Aldwich's financial adviser in relation to the Aldwich Bond Programme.

The extent of liability under Division 3 of Part IV of the SCA for 'Deemed Prospectus' liability under s 38?

[419] With respect to s 38(3) of the SCA 1993, the bondholders submit that in the case of an 'excluded offer' of securities (which is what the Aldwich bonds are) an IM is deemed to be a prospectus only insofar as false or misleading statements are made in that document, or material omissions are found. Therefore by virtue of the section, the IM is not a prospectus *and not required to comply* with many of the sections in Division 3 of Part IV of the SCA 1993 in relation to the issuing, filing and registering of prospectuses and advertisements of securities. In this context, reference is made to, inter alia:

(a) ss 41–43 relating to prospectuses which are to be registered with the SC and lodged with the Registrar and allows the SC to refuse to register a prospectus;

(b) ss 44 and 45 which prescribe the minimum information which must be disclosed in a prospectus;

(c) s 46 relating to renounceable rights issues;

(d) ss 47–49 which relate to different types of prospectuses;

(e) s 50 which governs the timing of advertisements of prospectuses at different stages of the registration process;

(f) s 51 which deems certain types of offers for the purchase of securities as prospectuses; and

(g) s 52 which prohibits premature representations and governs the degree of consent required for statements of third parties to be included in the prospectuses.

[420] However the bondholders submit that an IM for an 'excluded offer' is governed by or subject to the following provisions in Division 3 of Part IV of the SCA 1993:

(a) s 53 which prohibits the issuance of a prospectus containing statements of third parties without their written consent;

(b) s 54 which allows the SC to issue orders to stop the issue of securities;

(c) s 55 which imposes criminal liability on any person who causes the issue of a prospectus which contains misleading or false information or from which there are material omissions;

(d) s 57 (which is in issue here);

(e) s 58 which imposes civil liability on any person acting in a manner which is likely to mislead or deceive in connection with any prospectus or offer, issue or invitation for the purchase of securities including excluded offers;

(f) ss 59–63 which provide for defences to liability for s 58; and

(g) s 65 which renders void any agreement which operates to exclude prospectus liability.

Who precisely is liable under s 38(3) for deemed prospectus liability?

[421] The bondholders maintain that EY's interpretation of 'person' and its 'agent' as relating solely to Aldwich or MIBB would unduly restrict s 57 liability for false or misleading statements. They further submit that any such construction, limiting liability to the issuer and its principal adviser would be a 'skewed' reading as:

(a) it is a strained manner of construing the section;

(b) it would require the insertion of the words 'on behalf of that person by' after the word 'agent' in s 38(3);

(c) such a construction would only make Aldwich and MIBB liable, exempting AEM and Kamalul who were directly involved or responsible for some of the fundamental alterations and omissions. Such a construction would give rise to an absurdity in allowing such exemption from liability;

(d) such a literal reading would mean that no lead arranger or principal adviser would 'deposit' an IM with the SC as they would immediately incur liability; and

(e) the issuer would be virtually the only person incurring liability which again restricts liability unjustifiably.

[422] Accordingly it is submitted that any such construction should be rejected.

OUR ANALYSIS

Provisions of the SCA 1993 — Sections 32B, 38, 57 and 153

[423] In analysing the issues before us, it is necessary to first consider and comprehend:

(a) the framework of the SCA 1993;

(b) the form of regulation it imposes; and

A (c) the identity of the persons on whom such regulation is imposed.

[424] The SCA 1993 in its entirety comprises Parts I–VII. The relevant Parts for the purposes of this appeal are Part IV and to a lesser extent, Part V of the Act. Part IV deals with the 'Issues of Securities and Take-Overs and Mergers' in totality. That part of Part IV which deals with the issues of securities is therefore relevant to this appeal (the provisions on take-overs and mergers is not relevant).

[425] Part IV contains a comprehensive statutory framework on the offer and issuance of securities, which encompasses the Aldwich bonds ('Securities' as defined in s 2 of the SCA 1993 includes 'debentures' of a body corporate. 'Debentures' in turn are defined to include bonds).

[426] Part IV is divided into Divisions 1–4. Of particular relevance here are:

(a) Division 1 of Part IV which deals with 'Proposals in Relation to Securities' (which would encompass a proposal such as the Aldwich Bond Programme and submission to the SC); and

(b) Division 3 of Part IV which deals with 'Prospectus' (and thereby prospectus like liability in respect of information memoranda).

[427] As such, the provisions relating to the offer and issuance of securities, as well as the duties and liabilities imposed in relation to prospectuses are of relevance in this appeal. Although the Aldwich bonds fall within the purview of 'excluded offers', prospectus-like liability is imposed in respect of certain duties of disclosure in relation to the IM.

Section 32B of the SCA 1993

[428] Section 32 falls within Division 1 of Part IV, which relates to 'Proposals in Relation to Securities'. 'Proposal' relates to a 'person' who proposes to offer for subscription or purchase or to issue an invitation to subscribe for securities in Malaysia.

[429] In essence s 32 requires any person who proposes to offer securities for subscription or for purchase only with the approval of the SC (with statutorily provided exceptions), as is the case with the Aldwich bonds.

[430] Of primary relevance in the appeals is s 328 entitled 'false or misleading statements'. It provides that where any statement or information is required to be submitted to the SC in relation to any proposal for the offer or issuance of securities, neither the applicant, a financial adviser or an expert or any other person may submit any statement or information that is false or misleading or

from which there is a material omission. Neither may these persons engage in conduct which is deceptive or likely to mislead or deceive the SC. A

[431] This includes EY, the appellant here in its capacity as a financial adviser in relation to the Aldwich Bond Programme. It is pertinent that defences to a potential prosecution or any proceeding for a contravention of s 32B(1) are set out in 32B(2). B

[432] Section 32B(3) specifically provides that where a person who has submitted information or made a statement to the SC in relation to a proposal becomes aware, before the proposal has been fully implemented, that a statement or information may be false or misleading or incomplete or that the conduct may tend to mislead or deceive, the person is bound to immediately disclose to the SC, the facts of which he has become aware, and to carry out any directions that the SC might specify. C D

[433] The fact that the issuer and its advisers including its financial adviser are required to provide such full disclosure emphasises the primary requirement of capital market regulation, namely the need for full disclosure from all relevant persons in relation to the offer and issuance of the securities. It is equally important that the information so disclosed is both accurate and comprehensive. E

[434] Hence the severe consequences as set out in s 32B(4) of providing misleading or false information, or information from which there are material omissions. F

[435] Finally s 153 in Part V allows for civil proceedings to recover losses suffered as a result of the breach of s 32B. G

[436] Although EY has made comprehensive submissions in respect of s 32B maintaining that there has been no contravention of the same, in that no false or misleading statements were made by it in the course of the proposal, a perusal of the judgment does not disclose that the trial judge made any specific finding against EY in relation to the contents of the proposal to the SC under s 32B. H

[437] Her Ladyship's findings were primarily in relation to s 38 which are therefore examined below. I

[438] Suffice to say that s 32B is important because it underscores the importance of full disclosure on a continuing basis to the SC in relation of the submission of Aldwich's proposal for approval from the SC.

[439] It is evident that neither MIBB nor EY saw the necessity to advise the SC of the substantive alteration in the structure of the Aldwich Bond Programme, notwithstanding this section. We have pointed out s 32B (specifically s 32B(3) to make the point that the duty of disclosure under the SCA 1993 (and now the CMSA 2007) is continuous, from submission of a proposal up to issuance of the securities and beyond. Importantly, the continuing duty of disclosure to the SC continues beyond approval of the proposal.

[440] We move on to consider s 38 which relates to prospectus-type liability for excluded offers and the liabilities created thereby.

How is s 38(3) to be construed?

Are ss 57 and 153 applicable or inapplicable to an excluded offer under s 38(3)?

[441] Section 38(3) deals with excluded offers. In order to construe s 38(3) correctly it is necessary to understand the rationale behind an 'excluded offer'?

[442] Division 3 of Part IV, as submitted by the bondholders, runs from ss 35–65. It sets out a detailed framework of technical requirements and liabilities in respect of prospectuses and other documents issued to investors for the purposes of an offer of sale of securities to investors, *after approval has been obtained from the SC pursuant to Division 1.*

[443] Division 3 deals with prospectuses and requires them to be issued and lodged with the SC prior to being offered to investors. This is the case with retail investors. For more 'sophisticated' investors such as the bondholders in this case, the entirety of the statutory requirements in respect of a prospectus do not need to be adhered to.

[444] However there are minimum standards that are statutorily prescribed that do have to be adhered to, as set out in s 38(3) of the SCA (now ss 229 and 230 of the CMSA which deal with excluded offers and excluded issues). Section 38(3) and consequently some other sections of the SCA 1993 (ie those sections which are not expressly excluded under Schedule 2) are applicable even to excluded offers and issues. These sections create prospectus-like liability, but primarily in respect of false or misleading statements or the omission of material matters.

[445] In essence these provisions impose a statutory liability on an advisor/agent of such offer or issue in respect of an important statement in the IM which is false or misleading. The creation and imposition of such statutory

liability on the issuer as well as advisors and agents underscores the importance of disclosure as a cornerstone of securities law.

[446] In other words, if a maker or contributor of important information provides information that is not only erroneous but 'misleading' then he can be taken to task even if the investors concerned are sophisticated investors. It is therefore evident from s 38(3) that the SCA 1993 does not ignore false or misleading information by an issuer and its agent in circumstances where the investors are all 'sophisticated' investors.

[447] The underlying rationale for all investors, sophisticated or otherwise is that such information as is provided must be accurate or true. Primary facts stated must be true. If they are false that will occasion a basis for culpability under s 38(3) and other relevant attendant sections.

[448] Section 38(3) (and now ss 229 and 230 of the CMSA 2007) and the other related statutory provisions imposing liability for false or misleading statements ought to be read in the light of the underlying rationale or touchstone of securities law, namely the need for accurate information or disclosure. This will include not only statements which are misleading but also a failure to disclose primary facts of importance. This is in keeping with the underlying principles of corporate governance and the rule of law. Section 38(3) therefore ought to be construed with the foregoing rationale in mind.

What is an excluded offer?

[449] Section 38(3) in essence prescribes prospectus-like liability to an IM in respect of 'excluded offers'. This in turn begs the question, what is an excluded offer? How is it defined under the SCA 1993?

[450] As submitted by the bondholders the SCA 1993 provides for two levels of regulatory compliance in Division 3, namely full compliance with all sections in Division 3, namely ss 35–65. For excluded offers, a lesser degree of compliance is specified for offers and invitations of securities, as well as issuances. The definition of an 'excluded offer' specifies those sections which are inapplicable.

[451] The Aldwich bonds comprise an excluded offer and an excluded issuance as the investors are 'sophisticated' investors as opposed to retail investors. An excluded offer includes under s 38(3)(a): 'any excluded offer or excluded invitation specified in Schedule 2' (or (b) prescribed by order of the Minister. (b) is not relevant while (a) is on point in this appeal).

[452] Schedule 2 lists a variety of entities that are considered 'sophisticated'

investors, namely investors who have the relevant background, expertise and experience to make investment decisions and who accordingly do not require as much explanation in relation to risk compared to retail investors. Retail investors are in essence provided with considerably more protective measures to assist them in making an investment decision. But that is not to say that sophisticated investors are 'unprotected' or that all the provisions of the SCA 1993 in Part 3 Division IV are not applicable nor available to them. This is evident from a consideration of the definition of an 'excluded offer'.

[453] An excluded offer is one specified in Schedule 2. *A perusal of Schedule 2 discloses that it specifies which sections of Division 3 Part IV 'shall not apply'* to an excluded offer. The sections specified as being *inapplicable to excluded offers* or *invitations* under s 38 are ss 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 52 and 53of Division 3 of Part IV.

[454] It would logically follow, whether by way of a literal construction of the statute, or a purposive construction of the same, that *the other sections in Division 3 of Part IV* are applicable, which would include ss 57 and 58. It cannot be the case that ss 57 and 58 are excluded sections, although they are not specifically expressed as being excluded under Schedule 2.

[455] This conclusion is bolstered by s 40(1) which stipulates that the statutory provisions specified in Schedule 2 (or 3) do not apply to excluded offers, invitations or issuances. It follows that the statutory provisions not so specified in Schedule 2, are not excluded. In other words that the statutory provisions which are not set out as being excluded in Schedule 2 (or 3), are in fact applicable to excluded offers, invitations and issuances.

[456] Ultimately the exposure of liability by issuers and their agents and advisors to such statutory liability reinforces the construction that Parliament intended to provide prospectus like liability in respect of all investors, whether retail or sophisticated in relation to the provision of full and accurate information. The need for full disclosure applies to all categories of investors. And this is only logical as any person seeking to invest in a market must have at their disposal primary facts which are full and accurate. Statements that are not true, misleading or which fail to provide full disclosure will result in faulty decisions and potentially considerable losses. This in turn has adverse effects on the market as a whole. It explains why the SC is accorded such wide powers under the SCA 1993 to forestall and curtail any such conduct, whether from the issuer or its agents.

Section 153 of the SCA 1993

[457] Section 153 in turn falls within *Part V on Enforcement and Investigation*

but provides specifically that the *bondholders who have suffered loss or damage by reason of the conduct of another 'person' who has contravened Part IV* may obtain recovery by way of civil action. So if there is liability under ss 57 and 58 then it would follow that liability is attracted under s 153.

[458] We would therefore concur with the bondholders that under s 38(3), which imposes prospectus-like liability on the issuers (and agents) of an IM, for false and misleading statements or material omissions, also attracts liability under s 57 in Part III and s 153 in Part V of the SCA 1993.

In construing s 38(3), does prospectus-like liability extend to EY (as Submitted by the bondholders) or is it limited to the issuer Aldwich and its lead arranger or principal adviser, MIBB (as submitted by EY)?

[459] The answer to this question again turns on both an express and purposive construction of the SCA 1993. A literal reading of s 38(3) may suggest that liability for false or misleading statements is limited to the issuer, (here Aldwich) and its agent who issued the IM (MIBB). The question that then falls to be construed is whether it was the intention of Parliament to levy liability for false and misleading statements solely on the issuer and its principal adviser?

[460] Generally, it is indeed the lead arranger or principal adviser who plays the primary role in advising a client, namely the issuer on invitations, offers and issuance of securities. However it is equally true that the principal adviser in turn relies on a whole team of professional advisers including auditors in undertaking its role. The reality of this is seen in the various provisions of the SCA 1993 (and now CMSA 2007) specifying and providing for the respective roles and duties of such experts and other advisers. There are both statements as to the extent of liability of experts and advisers as well as provisions imposing liability both civil and criminal on such persons. It is therefore apparent that the SC has, under the SCA 1993 and the CMSA 2007, wide powers of monitoring and regulation over both the issuer and its team of advisers including the lead arranger or principal adviser and other experts including auditors.

[461] The primary argument here is that while such statutory provisions exist, they are solely for retail investors and the reach of those statutory provisions does not encompass nor impose liability on auditors for sophisticated investors. However there is a flaw in that argument in that such imposition of liability that does exist is primarily for disclosure-based acts or omissions. Such liability is imposed for false or misleading statements, deceptive behaviour and the omission of material information. Again the basis which we have relied upon, namely the need for full disclosure for all categories of investors, must

take the forefront in terms of construing the provisions of the SCA 1993 purposively and substantively, so as to ascertain its true reach.

[462] Having considered the competing submissions we are of the view that the construction put forward by the bondholders is the correct approach to adopt. We are in agreement with the bondholders that the more literal approach advocated by counsel for EY would have the effect of exculpating other contributors to salient portions of the IM.

[463] Significantly it would have the effect of exculpating AEM and Kamalul notwithstanding the direct roles played by them in facilitating the dissipation of funds which should have been deposited in the revenue account, while making only the issuer, Aldwich, and its principal adviser, MIBB, directly liable. This would give rise to an unreasoned and untenable position in law where the direct 'perpetrators' as it were, have no liability while the principal adviser, as an agent, becomes directly liable together with the issuer.

[464] We also concur that no reasonable lead arranger or principal adviser would agree to lodge or submit an IM if the liability for the entire document is levied on them or the issuer. It is only reasonable that an adviser to the issuer, who contributes to the content of the IM is liable for 'false or misleading' statements. In the instant case, EM was appointed by the issuer, Aldwich to carry out specific tasks in relation to the invitation or offer of the bond programme, as well as the issuance of the bonds.

[465] Therefore liability for their statements, if at all found to be false or misleading or lacking in material information, ought not to be attributable solely to the issuer and the principal adviser, as they relied on EY for its expertise to verify the truth of the statements made in that context.

[466] More significantly perhaps, the SC relies on the veracity and full disclosure of not only the issuer and the principal adviser but also all other experts or professional advisors who provide salient input vis a vis the IM. The SCA 1993 therefore imposes a separate liability on such advisers vis a vis the SC of full and honest disclosure

[467] *For these reasons it appears to us that s 38(3) in referring to the issuer or its agent, encompasses not only the principal adviser but also all other agents including in the instant case, EY, as auditor for the Aldwich Bond Programme.*

Did the trial judge err in finding EY liable for a contravention of s 38(3) and ss 57 and 153?

[468] A perusal of the judgment reveals that the trial judge dealt with the

statutory causes of action premised on s 38 and the relevant sections under the SCA 1993, in conjunction with the common law cause of action in negligence.

[469] The recognition of the statutory causes of action is explicit in paras 251–252. Her Ladyship found against EY in terms of liability under both causes of action ie under a breach of statutory duty, as well as in negligence.

[470] The distinction between the statutory breaches found, as compared to the liability in negligence is not clearly separable.

[471] Notwithstanding this, parties in their submissions before us undertook to deal with these causes of action quite separately, enabling us to therefore comprehensively consider EY's complaint that it had *NOT* breached either s 38(3) or 57, 58 or 153 either.

[472] First, we have dealt with and concluded that liability under s 38(3) extends not only to the issuer and the lead arranger, but to other advisers such as the financial adviser, EY. The issue that then arises for consideration is whether EY did in fact issue any 'false or misleading' statements or information or 'information from which there was material non-disclosure'.

[473] The factual matrix of the case shows that EY was not merely carrying out duties as an auditor under the provisions of the Companies Act 1965. It was undertaking a series of duties specifically in relation to the offer and issuance of the Aldwich bonds. As expressly stated by the trial judge, the categories of work and duties undertaken by EY included the following role (see para 250 of the GOJ):

(a) as the reporting accountant, EY undertook the valuation of AEM's business comprising the Catalyst Recovery and Tank Cleaning business which was supposed to be purchased by Aldwich with the bond proceeds, in the sum of RM119m;

(b) valuation of Aldwich's proposed WOR business in the sum of RM188m. This valuation was premised substantially on the cash flow projections for the following 15 years; and

(c) certifier of Aldwich's 15 year old cash flow projections upon which EY's valuation of the WOR business was based.

[474] While EY also undertook the tasks of auditing Aldwich with specific statutory duties under s 85 of the SCA 1993 and as the entity confirming Aldwich's annual actual and projected DSCR, those duties are primarily post-bond issuance and will be considered separately. For the purposes of s 38(3) the foregoing duties only are relevant for ascertaining whether EY issued

any 'false or misleading' statements or information from which there was material non-disclosure.

[475] In this context it is relevant too that EY contributed to the contents of the IM in relation to the valuation figures, although its entire report was not a part of the IM. EY was also a part of the DDWG, which meant that it undertook and assumed responsibility for the veracity of the information which it was tasked to verify. EY also signed the verification report whereby it confirmed the accuracy and completeness of the matters stated in the IM for which EY *had* been assigned responsibility. EY approved the IM in its final form.

[476] The nub of the issue is whether EY's valuation of AEM's existing businesses, namely the CR and tank cleaning businesses and its projected valuation of Aldwich's future WOR business were 'false' or 'misleading' or comprised information from which there were material omissions.

[477] The word 'false' means (1) not according with fact; wrong, incorrect (a false idea). (2a) spurious, sham, artificial (false gods; false teeth; false modesty). (b) acting as such; appearing to be such, esp. deceptively (a false lining). (3) illusory; not actually so (a false economy). (4) improperly so called (false acacia). (5) deceptive. (6) (foll. by to) deceitful, treacherous, or unfaithful. (7) fictitious or assumed (gave a false name). (8) illegal (false imprisonment). The word 'misleading' means causing to err or go astray, imprecise, confusing (The Concise Oxford Dictionary (9th Ed) Clarendon Press, Oxford 1995).

[478] The trial judge expended a great deal of time, consideration and analysis on the issue of EY's conduct of the valuation exercises. Not only did the trial judge examine the full scope of work undertaken by EY, rejecting EY's contention that it merely undertook an indicative valuation, but also considered and analysed the competing opinions of the two expert witnesses, Ravi Navaratnam for the bondholders and Sajjad Akhtar for EY. Her Ladyship undertook a consideration of EY's valuation report (albeit in the context of negligence) at paras 264 onwards of her judgment until para 285.

[479] Her Ladyship rejected the contention of an 'indicative valuation' concluding that it was in fact an independent business valuation in the commercial sense that was relied upon by MIBB in satisfaction of CP11 of the subscription agreement and CP6 of the IM and on the grounds that there was simply no other valuer other than EY.

[480] In short, the valuation prepared by EY and as reflected in the IM was an essential or critical fact that would comprise the basis for potential investors

such as the bondholders to base or make an assessment *in relation* to investment in the Aldwich bond.

[481] The truth and accuracy of the valuation was critical, particularly as it comprised a part of the IM. This was further borne out by the DDWG, which provided that EY would prepare a valuation report and not an 'indicative valuation'.

[482] The trial judge also found that if indeed EY found the words 'valuation' to be incorrect as set out in the IM, it ought, under its continuing duty of disclosure to the SC, have corrected the same. This was not done. EY was aware from the various roles it played in the processes leading up to the bond issuance, such as its role in the DDWG and the Verification exercise that its valuation of RM308.7m would be relied upon by potential investors such as the bondholders.

[483] EY did not raise the defence that the plaintiffs would not rely on the valuation by reason of the disclaimer in the IM. Neither did the disclaimer in the IM exonerate EY. Besides that, it is trite that parties cannot contract out of their statutory duties and rights.

[484] More importantly, the trial judge expended a considerable part of her judgment to the competing testimonies of the two experts, eventually preferring that of the bondholders' expert. Having perused Her Ladyship's grounds, we are unable to conclude that Her Ladyship was plainly wrong in so preferring the testimony of the bondholders' expert. It is important in this context to emphasise that as this is a 'speaking' judgment where the trial judge has undertaken a thorough and reasoned basis for her preference, an appellate court will not easily interfere unless it can be said that no similar tribunal or court similarly circumstanced would have arrived at the decision Her Ladyship did.

[485] In short, the standard of appellate intervention is considerably higher than in a case where a trial judge has failed to undertake this exercise or has so plainly misunderstood or misconstrued the evidence that an appellate court is bound to intervene on the grounds that no other judge could reasonably have arrived at that conclusion. This is certainly not such a case. As an appellate court therefore we are neither inclined nor able to reasonably reverse the decision of the trial judge in this important aspect.

[486] It is not possible, nor indeed necessary to detail here the comprehensive basis on which the trial judge chose to prefer Ravi's evidence over that of Sajjad. Suffice to state that Her Ladyship took into consideration the various challenges put forward in relation to the respective experts' evidence:

A (a) Ravi's evidence as an expert was challenged on the grounds, inter alia, that he was not sufficiently qualified. A perusal of the evidence discloses that there was a considerably lengthy time spent on detailed questions as to his precise working places in the early years of his service. Despite this a perusal of the entirety of his CV shows that he had more than sufficient B expertise to explain the valuation carried out by EY. Ravi was also said to have plagiarised sources without proper attribution. Having evaluated the evidence, the trial judge found that Ravi possessed the requisite expertise given his working experience in corporate finance, valuation and company restructuring for 25 years where he customarily deals with C auditors, issues of going concerns and distressed companies on a regular basis. She also took into account the list of positions he had held, namely General Manager of Danaharta, Chief Information Officer of Bursa Malaysia, Pricewaterhouse Cooper Financial Advisory, Restructuring Specialist at Sage 3 Capital) to conclude that he was sufficiently qualified D and reputable. In these circumstanes we are illequipped to find otherwise. It is not possible for this court to conclude that the trial judge was 'plainly wrong' and reverse the finding;

(b) the trial judge went to explain that Ravi's use of a basic accounting E textbook and information from a newspaper article was utilised in his report to facilitate an explanation for the court. The trial judge concluded that the allegation of plagiarism was without merit and did not serve to affect the expert's findings or the validity of his report. Again there is no basis to conclude that Her Ladyship was so far wrong as to F warrant appellate intervention;

(c) as for the errors in Ravi's findings, the trial judge found that he 'candidly conceded' to his errors which went positively towards a finding of credibility. Her Ladyship also attributed some of the errors on EY's audit G conduct to the fact that EY had not as of the relevant date provided all its audit documents in January 2014 when the expert report was made. Perhaps more importantly it is pertinent to note that the differing experts' opinions were primarily in relation to the valuation and not to the auditing function of EY. The latter findings were premised on a H contravention of s 85 of the SCA. In other words, the importance of Ravi's findings centred on the issue of whether or not the valuation provided by EY for use in the IM was negligent or otherwise;

(d) the most important aspect of Ravi's evidence which the trial judge relied upon was the valuation undertaken by EY which subsequently I comprised a part of the IM. Her Ladyship explained at length why she preferred or accepted his evidence that the valuation was negligent. Ravi explained the various methods of valuation available. Using the asset-based approach, he found the value of the CR business to be approximately RM36.35m, as opposed to EY's valuation of RM119m.

The second method of valuation namely the earnings before interest costs, tax deductions, depreciation and amortization or EBTDA showed a valuation of RM48.26m compared to the RM119m proffered by EY using the discounted cashflow method (DCF);

(e) Sajjad and Ravi were not far apart in the values they ascribed to industrial businesses in 2002, namely 9.23 times versus seven times respectively. However EY's valuation produced an EBITDA multiple of 17.26 times which is approximately double the accepted range. The trial judge noted this and concluded that EY was 'plainly wrong' in that it ascribed a value to the CR business of more than double what it was actually worth;

(f) with respect to the WOR business using the asset based method, Ravi arrived at a vauation of RM119.5m rather than EY's valuation of RM181m. This too the trial judge found to be negligent valuation.

(g) the trial judge found that there was no check undertaken to assess whether the figures put forward by EY were reasonable. There was no 'sanity check' undertaken to assess the viability of EY's valuation. to ensure that it did not arrive at an incredible value;

(h) the trial judge then undertook a consideration of the various factors put forward by EY as to why it acted reasonably, namely that it was performing according to instructions given to it by AEM and the lead arranger; it was not a formal valuation; it did not breach the standard of care required of it because there were long term contracts for the CR and WOR business which supported the use of the DCF method (solely); and

(i) it is apparent from a perusal of the evidence of the experts, the submissions and the judgment that the learned judge cannot be faulted, far less held to be 'plainly wrong' in the conclusion Her Ladyship arrived at. It cannot be said that the trial judge erred in accepting the bondholders' expert's opinion. As such his conclusions were validly accepted and relied upon.

[487] Ultimately, a perusal of the bondholders' expert's conclusion is telling. He states, inter alia, as follows in relation to the valuation of the CR and tank cleaning businesses as well as the projected business proceeds for the WOR plant:

(a) he found that EY's valuation was significantly overstated and misleading as it had not adhered to the standards and practices adopted by professionals which was to consider and evaluate several alternative methods to value the businesses;

(b) EY used the DCF method when it was apparent that it was the most unreliable methodology to use in the absence of a credible long term contract;

(c) EY had expressed reservations on the cash flow projection but nonetheless accepted it for valuation purposes;

(d) had they utilised the more appropriate method (of EBIDTA multiple earnings) method of valuation for the CR business and the asset based method for the WOR report, they would have arrived at a considerably lower valuation of RM167.76m rather than RM301.36m. This is a difference of about RM134.60m;

(e) the error in computing a proper valuation or in disclosing the variance arising from an application of other methods 'impaired the bondholders' ability to undertake an objective and credible evaluation';

(f) EY provided false comfort as to the level and quality of security for the senior bonds in the event they had to realise the assets to mitigate their losses;

(g) the valuation was a CP for the issuance of the Aldwich bonds. As such the accuracy and objectivity of the valuation was a key component of the IM. As reflected in the IM, it represented an overinflated and therefore untrue or misleading figure objectively speaking vis a vis potential investors or the SC. The SC gave its approval premised in part on statement of the financial adviser, EY as that would be one of the most critical factors to assess the feasibility of the Aldwich bonds.

(h) the evidence of, inter alia, Andrew Leong of the respondent, CIMB Investment Bank and Abdul Razak, PW3 bears out the importance of the valuation in relation to an assessment of whether or not to invest in the Aldwich bonds;

(i) EY permitted its letter of 28 January 2003 to be included in the IM. Therefore EY is a person who consented to being named in the IM as having made a statement;

(j) EY conducted its valuation of the WOR business by relying on the cash flow projections supplied by AEM. These projections were speculative. There was nothing to indicate that EY obtained sufficient assurance that those earnings figures were in fact reliable and achievable. Such assurances could only have been obtained with any degree of confidence from the existence of long term contracts with customers for the purchase of the waste products. Therefore there was no certainty about the achievable price and output quantities, according to the bondholders' expert, which meant that the cash flow projections were simply not reliable. The reality was that there were no long term contracts for the WOR business, in that there were no contracts that

were longer than one year. This was in point of fact ventilated at a meeting between EY and Aldwich's adviser prior to bond issuance. Nonetheless the valuation premised on this unreliable basis was included in the IM; and

(k) the trial judge also noted that EY, while on the one hand relying on AEM's cash flow projections without further query, at Aldwich's behest in May 2003, then went on subsequently to maintain that the cash flow projections were mere forecasts and were therefore not reliable nor representative of Aldwich's actual ability to achieve such forecast profits. There could be no approbation and reprobation by relying on the accuracy of the forecasts for the purposes of the valuation report in the IM, yet a downplaying of its reliability for the purposes of assessing the feasibility of the businesses in the future.

[488] The essential question for consideration is whether, given this complex factual matrix, EY's statement in the IM can be considered to be either false or misleading or lacking in material information for the purposes of s 38(3) and consequently ss 57 and 153. It could well be argued that EY was merely careless or inadvertent in the carrying out of its duties and hence, this ought not to amount to a false or misleading statement. There was no intention to create an untrue impression or to deceive anyone. It is always easy, with hindsight, to apportion liability, when in actuality the acts and omissions were more reasonably attributable to inadvertence and non-fortuitous circumstances.

[489] On the other hand, an examination and analysis of the factual matrix, which the trial judge undertook comprehensively, detracts from a conclusion of negligence to something more than simple inadvertence. Such a conclusion may be gleaned, inter alia, from:

(a) EY's ready acceptance of AEM/Aldwich's insistence on the use of the DCF method as opposed to any other method;

(b) EY's ready acceptance of AEM/Aldwich's insistence on the use of cash flow projections which it had forecast and prepared, as a basis for the valuation;

(c) the failure to use any other methods to assess or balance the valuation obtained from the use of the DCF method;

(d) the deliberate ignoring of the fact that there were no long term contracts in place to warrant sufficient certainty about the optimistic forecasts made in relation to the future proceeds of the businesses of Aldwich;

(e) the significant disparity between the valuation figures provided by EY and that obtained using any of the other accepted methods — RM130.4m;

(f) EY was aware that its valuation would be inserted and read and considered by investors. The fact that there is a disclaimer does not detract from the fact that given EY's reputation and assumption of responsibility in relation to providing a valuation for an IM, the figure stated by them would be viewed by investors as being reasonably accurate and credible; and

(g) even after EY became aware that the structure of the Aldwich Bond Programme had changed, in that the requisite novation and assignments would not proceed, but Supplemental BSAs would instead be relied upon to ensure proceeds would be placed in the revenue account, EY chose not to fulfil its distinct and disparate duty to report this matter to the SC. EY was, after all, a member of the verification committee. In this context it is evident that the statutory provisions impose a separate and distinct duty and obligation upon all the advisers to a proposed issuance to provide full disclosure to the SC at all times. In other words it is a continuing duty. EY chose not to provide any further disclosure to the SC.

[490] Given the factual matrix of this case, it is difficult to conclude that EY's conduct as specified above, throughout the proposal and issuance, could be defined as negligence or inadvertence. It appears to us, that as concluded by Her Ladyship in the trial court, EY, by reason of the factors set out above, did contravene the provisions of s 38(3) in providing statements that were false or misleading. *This can certainly be said of the valuation, which is not true, and by virtue of the extent of its inaccuracy, misleading.* For the sake of clarity, EY's breach is one of a statutory provision under s 38(3).

[491] In so far as failing to provide disclosure of material information, it appears to us that the failure to highlight or inform the SC of the change in the Aldwich bond structure prior to issuance of the bonds is also a contravention of the provision imposing a continuing liability on advisers such as EY to advise the SC of material changes. This was particularly important in view of the fact that the security of the ring-fencing structure was destroyed by the waiver of the CPs (as has been discussed at length in relation to MIBB).

[492] We therefore decline to overturn or reverse the findings of the trial judge that EY did in fact contravene its statutory obligations under s 38(3) and 32B(3) of the SCA 1993. Accordingly it follows that the trial judge did not err in finding liability under ss 57 and 153 (in Part V).

Section 57 of the SCA

[493] With respect to s 57 it is not in dispute that EY's letter of 28 January 2003 was annexed to or comprised a part of the IM. As such EY is a person

named in the IM with his consent as having made a statement included in the IM. Such a person falls within s 57(e), who therefore becomes liable for any false or misleading statement made in the IM. It follows from the conclusions above that the trial judge's conclusion that EY breached this section is correct.

[494] We have earlier concluded that the valuation report is false and misleading to a potential investor who relies on the IM. Accordingly it follows that the trial judge did not err in finding liability under ss 57 and 153 (in Part V).

Independent liability under the SCA 1993 (and CMSA 2007 now)

[495] The objective or purpose of the SCA 1993 is to devolve and apportion liability independently and separately to the various participants in a securities issuance programme. To this end the SCA 1993 imposes specific liability on auditors and accountants who are assigned and accept liability for various aspects of their professional work.

[496] Ultimately it is the integrity of each of these participants, such as the auditors that ensures an orderly and sound market. The express statutory provisions imposing such liability as may be seen, particularly in ss 32B and 38, consequently allowing for liability in ss 57 and 153, reflect the importance of full disclosure and high standards of integrity in the issuance of securities.

[497] The fact that some of the participants are prepared to conclude that specific disclosure is not necessary in the circumstances does not absolve the other participants from ensuring that their independent and primary obligations of disclosure are fully met. In short, these provisions provide a check and balance between the lead participants such as the issuer, the lead arranger, the trustee and the auditor.

Causation

[498] If EY had undertaken its duties owed under ss 32B, 38 and consequently 57 and 153 as required under the statute, it is likely that the bondholders would have had a clearer picture of the investment which they were undertaking (particularly as they had no access to documentation otherwise than the IM).

[499] If the valuation had been more realistic it is probable that many of them would not have participated, given the large disparity between the quantum stated in the IM and the more reasonable estimation that would have been accorded by a reasonable valuer/accountant utilising more independent and prudent principles in the course of the valuation.

[500] If there had been full disclosure of the material and significant alterations to the scheme which EY became aware of as a member of the DDWG and a contributor to the IM, again it is probable that the SC would have taken steps to ensure that alterations would have been made to the IM to advise prospective bond investors of the additional risk factors. It is equally possible that the conditional approval given would have been retracted such that the bond issuance would not have proceeded or that it would have been suspended until further security measures were put in place. The failure to report to the SC which remained a continuing duty on the part of EY contributed to the bond issuance proceeding despite the breakdown in the ring fencing structure and thereby the ultimate security feature of the Aldwich Bond Programme.

[501] This in conjunction with the events that took place post bond issuance (where EY also had a part to play) caused and or contributed to the losses suffered as a result of the failure of the Aldwich Bond Programme. The element of causation is therefore established, as the trial judge found.

Post-bond issuance

[502] The trial judge found liability under s 85 of the SCA 1993 premised on the factual basis that EY failed to report Aldwich's wrongdoings to Mayban Trustees and the SC. EY maintains that the trial judge erred in these findings.

[503] A perusal of the judgment from paras 253–261 shows that the trial judge undertook a detailed analysis of both the facts and the law before concluding that EY had contravened its duties under s 85.

Interpretation of ss 85(2) and 85(3)

[504] Section 85(2) prescribes the duties owed by an auditor performing his duties in the context of a bond issuance owed to a trustee for a debenture holder. In the instant case it refers to the duties owed by EY to Mayban Trustees in the context of Mayban Trustees exercising its powers under the trust deed for the benefit of the bondholders.

[505] What is the specific duty owed? The section stipulates that EY is bound to report any matter which in its professional opinion is relevant for Mayban Trustees' exercise and performance of its powers and duties. In short the statute imposes a duty on EY to advise Mayban Trustees of any matter which, on the basis of an objective test, namely its professional opinion, may require Mayban Trustees to exercise its powers and duties under the trust deed.

[506] Section 85(3) is of broader scope. It requires an auditor undertaking

duties in relation to a bond issuance, to report to the SC two categories of irregularities or wrongdoings, as soon as he becomes aware of the same. These two categories are:

(a) any matter which may, in his professional opinion, constitute a contravention of the SCA 1993; or

(b) any irregularities that would have a 'material' effect on the ability of the borrower, here Aldwich, to repay 'any amount under the debenture' here under the bonds, to the bondholders.

[507] There are therefore specific express statutory provisions imposing a liability on such an auditor, here EY to report a potential contravention of the SCA 1993 or irregularities that would have a significant impact on Aldwich's ability to repay the bondholders.

Were there breaches of these sections by EY?

[508] It is not possible at this stage, the appellate stage, to set out the evidence in any considerable detail in relation to these provisions. Suffice to say that as the trial judge correctly pointed out, EY's primary witness did not know the specific duties owed by an auditor appointed under a bond issuance scheme and appeared to respond in his answers as if EY were merely undertaking a routine statutory audit. EY therefore appears to have treated its role, post-bond issuance as one of merely undertaking a statutory audit for Aldwich, coupled with a need to ensure that DSCRs were met. There was no further comprehension that the auditor in such an event is encumbered with onerous statutory duties to ensure that the Aldwich bond structure is not breached until full repayment is effected to the bondholders. The auditor has to independently check on the progress of the bond programme and alert the trustee so as to enable the trustee to exercise its powers to safeguard the interests of the bondholders. Additionally, the duty to report to the SC is a further independent provision to regulate market irregularities.

[509] The essence of these provisions requires that an auditor such as EY when assuming the responsibilities of an auditor in a bond issuance undertakes its obligations and performs them in accordance with the statute. Here EY had assumed and accepted such responsibilities. But it is evident from the evidence that there was no comprehension of the extent of the duties and responsibilities that it had undertaken. As such these duties and responsibilities were simply not performed.

[510] Suffice to state that post-bond issuance:

(a) EY should have noted, but failed to report or advise that business proceeds from the businesses of AEM and Aldwich were not being paid

into the revenue account but largely into the disbursement account. The cascading waterfall order of priority had been breached;

(b) the ring-fencing structure that comprised the bulwark for the protection of the bondholders had been breached; and

(c) accordingly, provisions of the trust deed (more particularly cll 9.1(dd) and 7(b)(i) of the assignment and charge agreement had been breached.

[511] These comprise glaring omissions in the context of an auditor performing his duties under a bond issuance programme. It might not be so noticeable if an auditor were merely carrying out a routine statutory audit, in that the monies were still within the Aldwich fold, so to speak (although large sums were also dissipated otherwise). And that perhaps is the critical difference in this case. This is a case where EY was part of the DDWG, and therefore aware of the breach of the ring fencing provisions even prior to bond issuance. Despite this no report was made to the SC as would be anticipated and more importantly statutorily provided under s 32B.

[512] Further and separate duties were imposed on EY post-bond issuance and even when monies were not remitted as envisaged under the supplemental BSAs, EY said and did nothing. This is a case where EY did not make any report whatsoever for the entirety of six years. Given the onerous duties placed on it vide the legislation, namely the SCA 1993 and now CMSA 2007 by the SC, it is difficult to conclude otherwise than that EY failed to perform its statutory obligations. Therefore whether reference is made to ss 85(1) or 85(3), it is evident that both those provisions were breached.

[513] Generally speaking the courts are slow to find breaches of duty or apportion liability on auditors, as is evident from the vast spectrum of case-law that subsists. Again that is primarily because it is easy with hindsight to infer liability without giving full consideration to the complexities of a particular case. However this is not such a case. The factual matrix is such that the breaches are clear. They could have been highlighted if EY had comprehended the extent of its duties under the law and acted accordingly. This required EY to undertake a probing and comprehensive review of the accounts and the manner in which monies were paid in and out, in the context of the bond issuance exercise. It was not simply a matter of ensuring that the monies 'added up' so to speak. EY's duties extended well beyond that.

Causation

[514] In terms of causation if EY had undertaken its duties as it was meant to it could have discovered in 2004, as submitted by the bondholders that, all monies from the proceeds of business and other monies due to it were being

credited directly into the disbursement account and not the revenue account. This would have been evident because EY had access to all the bank statements and relevant data to ascertain this crucial fact. If this had been highlighted to the trustee and more significantly perhaps to the SC, it is likely that the continuance of this practice could have been stopped, instead of proceeding in that manner for the following several years. This caused direct loss of monies to the bondholders.

[515] If these material irregularities had been highlighted, Aldwich would not have been able to pay RM166m to AEM from March 2008 until October 2009. A sum of RM59m held in the escrow account would not have been released to AEM in January 2005. Further Aldwich would not have been able to pay RM16.7m to Kamalul between October 2006 and June 2009 purportedly for the repayment of advances made by him. Nor would Aldwich have been able to pay RM27.5m to Kamalul towards partial redemption of the junior notes in breach of the bond contracts.

[516] In the course of the judgment Her Ladyship in finding these contraventions distinguished cases cited by EY from:

(a) the Privy Council in the New Zealand case of *Deloitte Haskins & Sells v National Mutual Life Nominees Ltd* [1993] AC 774 ('*Deloitte*'s case'); and

(b) the Federal Court of Australia (equivalent of our High Court) in the case of *Mercedes Holdings Pty Ltd and Others v Waters and Others (No 2)* (2010) 78 ACSR 118 ('the *Mercedes* case').

[517] We are, with respect, in full agreement with Her Ladyship's distinguishing of those cases on the grounds put forward by her. In essence Her Ladyship concurred with the New Zealand Court of Appeal which expressly disapproved the Privy Council's narrow interpretation of an auditor's reporting duty in *Deloitte*'s case, and concluded instead that focus should be placed on the requirements of the form of the report as prescribed in the regulations in order to determine the extent of the responsibility assumed by the auditors. It should also be noted that the Privy Council spoke of a breach of duty in the context of a common law duty (see p 787 of the case).

[518] With respect to the *Mercedes* case the trial judge found it unhelpful and not directly comparable. The words used in the Australian Corporations Act 2001 was 'is aware' while our s 85(2) and (3) use the words 'becomes aware'. In the *Mercedes* case, the judge held that the word 'aware' meant 'actual knowledge'.

[519] The dictionary meaning of 'aware' is knowledge. Accordingly 'becomes aware' in our statute means comes to know. And 'is aware' means knows. Therefore, with respect, the addition of the word 'actual' does little to enhance or define the meaning of aware. Aware simply means knows. In the context of the SCA 1993 therefore when the auditor comes to know of an irregularity or a matter which in his professional opinion is relevant to the trustees, his duty is invoked. There is no real distinction between knowing something and having 'actual knowledge' of something.

[520] To that extent, with respect, the *Mercedes* case does little to define the duties of an auditor under s 85 of the SCA 1993, as the language is clear and ambiguous. The existence of 'in his professional opinion' in s 85(3) provides for an objective assessment.

[521] In the instant case it is clear from the factual matrix set out above that by the application of an objective test, EY was under a clear duty to alert the auditors and highlight the material irregularities to the SC, as they were sufficiently serious to warrant concern about full repayment to the bondholders.

[522] We are therefore satisfied that Her Ladyship's findings and reasoning are, with respect, sound. There is no cause for appellate intervention.

Negligence

Duty of care

[523] The key issue that arises for consideration when determining whether negligence is available as a cause of action to the bondholders against EY is the existence or otherwise of the primary element of a 'duty of care'. Does EY owe a duty of care to the bondholders? In this context it is pertinent that EY maintains that its primary duty of care is owed to the issuer, Aldwich that appointed it and no other party. It is equally significant however that EY, in undertaking its duties as auditor in this issuance of securities under the SCA 1993, is a licensed auditor under the Act. In other words EY in undertaking. its duties as auditor both pre- and post-bond issuance was recognised as sufficiently qualified to assume the duties of an auditor under the Act. This necessarily warrants the conclusion that EY is cognisant of, and conversant with its duties under the Act and the consequences of a failure to comply with the provisions of the Act.

[524] While there are several aspects to the scope of EY's duties, one of the main issues that falls for determination is that of the valuation proffered by EY, which was then utilised in the IM. As that was the only information on

valuation available to prospective investors such as the bondholders, it was the trial judge's finding that the bondholders relied on the valuation to decide whether or not to invest in the Aldwich bonds.

[525] In order for EY to incur any form of liability in negligence vis a vis the bondholders, it must first be established that EY assumed a duty of care to the bondholders. The case-law on this common law cause of action suggests that if EY knew (or ought to have known) that the prospective investors such as the bondholders would rely on their valuation to make a decision on investment, EY would owe the bondholders a duty of care to ensure that the valuation was undertaken on sound principles of valuation premised on data that was independent and fully appraised. The fact that EY was constrained to undertake an independent and competent valuation vis a vis Aldwich is undisputed. As explained earlier, both elements of 'independence' in relation to the forecast projections and the valuation itself were found by the trial judge to be poorly undertaken resulting in a finding of negligence. Again as stated earlier we find no reason to fault the trial judge's findings on the factual premise. What is relevant for the purposes of this appeal is whether EY owes the bondholders a duty of care in law.

[526] In this jurisdiction, in determining whether a duty of care is owed, we have adopted the principles and reasoning in the leading English case of *Caparo Industries plc v Dickman* [1990] 2 AC 605 (HL) ('Caparo') (see the Federal Court cases of *Tenaga Nasional Malaysia v Batu Kemas Industri Sdn Bhd and another* [2018] 5 MLJ 561; [2018] 6 CLJ 683, followed in *Pushpaleela a/p R Selvarajah & Anor v Rajamani d/o Meyappa Chettiar and other appeals* [2019] 2 MLJ 553; [2019] 3 CLJ 441; [2019]1 LNS 61; and *Lok Kok Beng & 49 Ors v Loh Chiak Eong & Anor* [2015] 4 MLJ 734; [2015] 7 CLJ 1008). In that case the House of Lords held that there were three criteria for the imposition of a duty of care — foreseeability of damage, proximity of relationship, and reasonableness. A statement put into general circulation would not satisfy the proximity of relationship requirement, *unless it could be shown that the maker of the statement knew his statement would be communicated to the person relying on it, either as an individual or a member of an identifiable class. for the purposes of entering into a transaction.* (Emphasis added.) (see pa 621 of the case per Lord Bridge of Harwich):

> *Lord Bridge in Caparo Industries plc v Dickman* [1990] 1 All ER 568 at 573–574, [1990] 2 AC 605 at 617-619). After reviewing a number of cases in which a duty of care had been held to exist, Lord Bridge summed up:
>
> > The salient feature of all these cases is that the defendant giving advice or information was fully aware of the nature of the transaction which the plaintiff had in contemplation, knew that the advice or information would be communicated to him directly or indirectly and knew that it was very likely that the plaintiff would rely on that advice or information in deciding whether or not

> to engage in the transaction in contemplation. In these circumstances the defendant could clearly be expected, subject always to the effect of any disclaimer of responsibility, specifically to anticipate that the plaintiff would rely on the advice or information given by the defendant for the very purpose for which he did in the event rely on it. So also the plaintiff, subject again to the effect of any disclaimer, would in that situation reasonably suppose that he was entitled to rely on the advice or information communicated to him for the very purpose for which he required it. (See [1990] 1AllER 568 at 576, [1990] 2 AC at 620-621.)

[527] In the Australian case of *Dartberg Pty Ltd v Wealthcare Financial Planning Pty Ltd* [2007] FCA 1216, a decision of the Federal Court of Australia it was held that if the auditor had knowledge of the purpose of the audits and was aware that such audits would be relied upon by an identifiable third party, then a duty of care may arise between the auditor and the third party.

> [59] The facts or elements upon which the respondents rely support the contention that a party such as KPMG may owe a duty of care to a confined class comprising investors who had acquired promissory notes issued by either York Street or Market Street. In the present case, the vulnerability of the applicant arose subsequent to the making of the investment by reason of the loss of control over the use of the funds and the lack of capacity to take any steps to monitor the recoverability of the loan made by the mezzanine companies to the primary borrowing entity. There is a basis for concluding that KPMG either may have known or ought to have known of these facts, and that KPMG may have had the relevant control itself to take steps to protect the confined class of investors ...

[528] In the instant case, applying the foregoing principles it would follow that EY did owe a duty of care to the bondholders who would rely on the IM to make a decision on investment. EY in turn knew or ought to have known that the bondholders would do so. In this context it is pertinent that the bondholders had no access to information other than that provided in the IM. So the base line information available to them had to be reasonably accurate. To that extent a duty of care was owed.

The element of foreseeability

[529] A key element in determining whether a duty of care subsists is that of foreseeability. EY was appointed an auditor for the purposes of:

(a) providing a valuation which they knew would be inserted and comprise a part of the IM;

(b) post-bond issuance — monitoring funds being remitted into Aldwich's accounts as provided for under the scheme (cascading accounts with specific priorities) with a view to ensuring sufficiency of funding in the DSRA for repayment of the bondholders.

[530] In carrying out these duties, EY as a licensed auditor under the SCA 1993, was responsible for ensuring due compliance with the relevant provisions of the SCA 1993 as has been discussed in detail above.

[531] In determining the scope of EY's duties therefore, it is not possible to sever its duties under the SCA 1993 in relation to its role as auditor in a securities issuance scheme, from its general duties. This point is made because the scope and standard of care envisaged in the particular factual matrix of this appeal is vastly different from the duties of a statutory auditor carrying out an annual review of the company's performance. That requires compliance with primarily the Companies Act 2016. However in the instant case the relevance of the SCA 1993 and the duties imposed by the Act on an auditor such as EY, cannot be excluded in determining the scope of duty of EY as a licensed auditor in respect of the Aldwich bond scheme.

[532] Having considered the scope of EY's duties it therefore follows that EY knew or ought to have known that prospective investors such as the bondholders would rely on the information it provided in relation to the valuation as that valuation was the sole data in the IM on which a prospective investor could make a decision as to whether to invest or not.

[533] A relevant case in point is that of *Law Society v KPMG Peat Marwick (sued as KPMG Peat Marwick McLintock) and others* [2000] 1 All ER 515 (Chancery Division) ('*Law Society* case'). In that case, KPMG were engaged by DF, a firm of solicitors, to prepare accounts which would be delivered to the Law Society in accordance with the Solicitors Act 1974. This would enable the society to launch interventions if there were improprieties and protect its compensation fund. A senior partner in DF had defrauded some clients and the fund had to pay compensation.

[534] At first instance it was held that it was foreseeable that a lack of due care would result in a failure to detect improprieties which would lead to losses and pay outs from the compensation fund. There was also sufficient proximity between the society and the accountants, as the sole purpose of the report was known. Imposition of a duty of care would therefore be fair, just and reasonable.

[535] Similarly, we are of the view that it was foreseeable that the failure of EY to prepare an independent and accurate valuation for the Aldwich Bond Programme would cause losses to the bondholders who would rely on the valuation (we have earlier stated in the body of the judgment that we concur with the trial judge's finding of fact that the valuation was negligent).

[536] We are also cognisant of the argument by EY that the bondholders constitute a fluctuating and indeterminate class, and that this detracts from the imposition of a duty of care. The fear being the creation of a liability to an indeterminate class. However we take the view that such a fear is unfounded. The class of investors to whom the duty of care is owed is circumscribed. More significantly perhaps the existence of the SCA 1993 and the statutory provisions imposed on EY make it incumbent upon EY to ensure that no misstatements are made in the IM for instance for the ultimate protection of investors such as the bondholders. This element is inherent in this jurisdiction where the SCA 1993 imposes this duty on a licensed auditor such as EY which is undertaking duties implicit in the issuance of securities. In other words, by virtue of the SCA 1993 (and now the CMSA 2007) licensed auditors owe a duty of care to potential investors to ensure that information which they disseminate is accurate and truthful and that no element of material non-disclosure subsists. Therefore the question of an indeterminate class does not arise as the duty is circumscribed by statute.

[537] Further credence is given to our conclusion by the learned authors of *Clerk & Linsell on Torts* (20th Ed, Sweet & Maxwell and Thomson Reuters, 2010). At para 8-08, in relation to the class of claimants who can claim a duty of care against a tortfeasor, it is said:

> Duty to class of claimant
>
> As a general rule it is not necessary that the claimant should have been within the defendant's contemplation as an identified individual. It is sufficient if he falls within the class of persons who might foreseeably suffer the particular loss to which the duty relates.

[538] It would be overly restrictive if the courts were to hold EY liable only to Aldwich or specifically identified investors in its contemplation at the time it prepared the valuation report, which on the facts would be MIBB alone.

[539] In arriving at our conclusion we are mindful of the general rule as best enunciated by Cardozo CJ in *Ultramares Corp v Touche, Niven & Co* 255 NY 170; 174 NE 441 at 444 namely that in determining whether a duty of care subsists, the policy should be to exclude 'liability in an indeterminate amount for an indeterminate time to an indeterminate class'.

[540] Here the first element, namely liability is not indeterminate because the bondholders have quantified their losses. Again the second element of an indeterminate time does not pose a problem as the success or failure of the Aldwich bond programme is for a determinate period, namely a tenure extending to the date of redemption of the bonds/notes, or earlier if an event of default is declared, as was the case here.

[541] The main consideration is the third element, namely the 'indeterminate class'. However from the factual matrix, it is apparent that EY knew that investors purchasing the bonds would rely on the IM to assist them in making their decision. Therefore, it follows that the investors in the Aldwich bond programme, here the bondholders, constitute a determinate class.

The element of proximity

[542] The first two limbs of *Caparo*, foreseeability and proximity, tend to overlap, but it is helpful to discuss them separately.

[543] In *Royal Bank of Scotland plc v Bannerman Johnstone Maclay (a firm)* [2005] CSIH 39 (Court of Session — Inner House) ('Bannerman'), the accountants knew that the bank's support of the company was conditional on view of the accounts. In *Bannerman* it was held that a duty of care could arise if the party who relied on the information could prove that:

(a) the auditors knew about the purpose of the request for information; or

(b) that the information provided would be relied upon by the third party, thereby establishing the element of proximity between the auditor and the third party.

[544] Applying *Bannerman,* it would follow that since EY knew the purpose it was preparing the valuation for, ie for inclusion in the IM which was ultimately to be circulated to potential investors for them to decide whether to invest in the Aldwich bond programme, there was sufficient proximity between EY and the bondholders to justify the existence of a duty of care owed by EY to the bondholders.

[545] We shall address the issue of the disclaimer later on in the judgment. At this juncture we cite *Bannerman* to support our finding of the existence of a duty of care, more particularly the element of proximity.

The element of fairness, justice and reasonableness

[546] As for 'fairness, justice and reasonableness' which forms the third limb of *Caparo*, this is a test of 'ordinary reason and common sense' per Saville J in *Minories Finance Ltd v Arthur Young (a firm) (Bank of England, third party); Johnson Matthey plc v Arthur Young (a firm) (Bank of England, third party)* [1989] 2 All ER 105 at p 110, referencing Lord Radcliffe in *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696 at p 728.

[547] The learned authors of *Clerk & Linsell on Torts* (20th Ed, Sweet & Maxwell and Thomson Reuters, 2010) state at para 8–17 that the narrow

meaning of this is justice and fairness between the parties, while the broader meaning of this is the reasonableness of a duty from the perspective of legal policy. We are of the view that whether in the narrow or broad meaning of this phrase, it is fair, just and reasonable that a duty of care be imposed upon EY. We would reiterate that such a duty is imposed on licensed auditors who assume responsibilities under the SCA 1993 (now the CMSA 2007) where such duties are statutorily imposed and therefore comprise an essential part of their duties when undertaking responsibility in the issuance of securities to potential investors (as prescribed under the statute).

[548] It was foreseeable that the bondholders would rely on the IM which included the valuation by EY, because the IM was the only way they could evaluate the risk of investing in the programme, especially since the issuer was not an established business with a well-known track record. Therefore it is fair, just and reasonable to impose a duty of care upon EY to prevent bondholders from sustaining losses incurred in reliance on the IM as a result of their negligence. Again it should be reiterated that such a duty of care would not generally arise in a situation such as an ordinary statutory audit under the Companies Act 2016.

Was there a breach of the duty of care owed by ey to the bondholders?

[549] In order to determine whether EY was negligent and breached its duty of care to the bondholders, the primary issue is whether the valuation by EY was one that no reasonable valuer in EY's position would have given. We have discussed the valuation earlier on in the judgment and do not propose to do so again. Suffice to reiterate that we did not find the trial judge to be plainly wrong in her findings after evaluating the expert testimony of the two competing witnesses.

[550] In further support of our concurrence with the findings of the trial judge we found the Singapore Court of Appeal case of *JSI Shipping (S) Pte Ltd v Teofoongwonglcloong (a firm)* [2007] 4 SLR 460; [2007] SGCA 40('JSI Shipping') to be of particular relevance.

[551] In that case, VK Rajah JA clarified and restated the law of professional negligence in the context of statutory audits. More specifically, His Lordship evaluated the standard of care expected of an auditor in relation to the objective verification of relevant financial particulars and discussed the principles of causation applicable in a claim for damages against auditors.

[552] In *JSI Shipping*, the appellant engaged the respondent to conduct three statutory audits of the appellant's accounts. All three audits were unqualified. The appellant sustained losses as a result of its Asia director siphoning off its

funds by, among other things, misstating his remuneration (bearing some resemblance to the instant appeal where Kamalul withdrew monies and did not deposit monies into the accounts according to the priority of payments under the ring-fencing scheme). The appellant brought an action against the respondent for damages resulting from alleged breaches of its contractual obligations and duty of care in auditing the appellant's accounts.

[553] The Singapore Court of Appeal held that the standard of care expected of an auditor depended on:

(a) the standard required as a matter of contract and under the relevant statutes or regulations;

(b) expert evidence relating to the conduct of the audit; and

(c) the relevant auditing standards set by the governing professional body.

[554] In assessing whether an auditor had breached its duty of care, the conduct of the auditor must be looked at in the light of the circumstances reasonably known to the auditor at the material time and not *ex post facto.* The standard of reasonable care must be objectively assessed on the basis of knowledge reasonably available to the auditor and all the measures that could have been reasonably adopted at the material time.

[555] In deciding if there was a causal link between the breach of duty and the loss claimed, the Court of Appeal held that the court would look at whether the breach was an 'effective cause' of the loss. The loss must be proved by the claimant and must fall within the scope of the duty of care.

[556] *JSI Shipping* dealt with the liability of an auditor in relation to statutory audits, unlike in our case where EY was dealing with, inter alia, a valuation for the issuance of securities under the SCA. We are cognisant of EY's submission that what it prepared was an 'indicative valuation' which was not intended to be used or relied on by prospective investors such as the bondholders. To that extent EY argues that it cannot be held liable in negligence as the scope of duty cannot be drawn so widely.

[557] We are, however, unable to concur with EY's submission. On the contrary, we concur with the trial judge that, whether:

(a) objectively as a matter of business common sense; or

(b) evidentially, on the basis of witness testimony on record

the valuation provided by EY comprised a core factor for investors in their determination as to whether or not to invest in the bond programme (see the

A evidence of Saraswathy as relied on by the trial judge). This is further bolstered by the fact that EY was the sole valuer for the programme as testified by EY's witness Ken Pushpanathan (DW8).

B **[558]** Finally, in *JSI Shipping*, it was also held that the standard of care expected of an auditor would be dependent upon the relevant statutory provisions and regulations. This too squarely lends support for our earlier conclusion that establishes that EY had, on the facts of the instant appeal, assumed under greater responsibility under the relevant statutory provisions of the SCA 1993.

C

[559] Applying the foregoing principles to the present facts, we concur with the trial judge that a reasonably competent valuer, exercising the requisite skill and responsibility, with a healthy degree of professional scepticism, should D have been alerted by the fact that there were no long term contracts for the WOR business and should have realised that there was a significant lack of certainty in the cash flow projections supplied by AEM.

[560] Therefore, EY failed to comply with the standard of care by not:

E

(a) making proper or further inquiries into the achievable price and output quantities of the WOR business;

(b) seeking assurance or verification of the cash flow projections provided by AEM; nor

F

(c) carrying out any appraisal of the feasibility of the WOR business.

[561] We have earlier dealt with the expert evidence adduced during trial on the alternative methods of valuation and comparisons of the values arrived at. G We concluded that the trial judge did not err in finding, based on such evidence that EY failed to act with the requisite standard of care required of an independent valuer. In summary form, the breaches of the duty of care are as follows:

H

Pre-bond issuance

(a) the use of the Discounted Cash Flow (DCF) method advocated by AEM instead of cross-checking with and considering other alternative methods of valuation. The DCF method was not appropriate in this case I as the cash flow projections were not reliable, having been provided by Aldwich itself, and accepted in toto. Moreover Aldwich did not have any long term contracts at that time, rendering those cash flow projections speculative.

EY admitted that if it had used any other valuation method, it would have resulted in a lower valuation of AEM's business.

(a) for example, EY valued the CR business at RM119.9m despite having only RM9m in assets and only a two year track record and operating history. If the asset-based approach had been utilized instead, the valuation of the CR business would have been far less, in the region of RM36.36m. If the earnings-based approach had been utilized the CR business would have been valued at RM48.26m. This goes to show that the valuation by EY was far in excess of the value achieved utilising other more credible methods for this kind of valuation.

The difference in the respective valuations obtained is attributable to the 'goodwill' element. EY attributed 'goodwill' to the business in the sum of RM103m, however most of the elements listed by EY did not comprise true elements of goodwill. The trial judge held that this inexplicable and wrongful attribution of goodwill to EY's valuation clearly amounted to negligence on the part of EY. We have no reason to conclude that the trial judge was plainly wrong in so concluding;

(b) EY's valuation of the WOR business came to RM188m. However, an application of the asset-based approach provided the significantly lower figure of RM119.5m. The earnings-based approach could not be utilised since the WOR business had not commenced operations and was the first plant of its kind in Malaysia, and so there was no evidence for valuers to rely on;

(c) EY valued AEM's business at RM308.7m because it accepted AEM's desired discount rate of 14%. The complaint here is the acceptance of the rate proposed by AEM. It was not a credible or tenable discount rate on which to value the business. It was much lower than the rate of other bonds of the same grade. If EY had cross-checked against rates payable on other similarly rated bonds, AEM's business would have been given a lower valuation, according to the expert evidence adduced. EY thus gave AEM's business an artificially higher value, causing more Senior Bonds and Junior Notes to be issued. *When more Junior Notes are issued compared to the Senior Bonds, investors were misled into perceiving that the Senior Bonds were secure.*

Post-bond issuance

(a) EY was negligent in performing its duties as the confirmer of the DSCR from 2004 until 2009 because it never certified the cash balances in the DSRA when certifying Actual DSCR. Further, in calculating Actual DSCR, EY used three months of projected figures instead of the net operating cash flow for the actual previous 12 month period as required

under the IM. Had EY properly computed the Actual DSCR, it would have noticed that the Actual DSCR had fallen below the 1.5 minimum prescribed by the IM;

(b) as we have discussed above under the heading of statutory breach, EY was in breach of various reporting obligations to the SC when it became aware of irregularities. Post-bond issuance, EY had a continuing duty to inform Aldwich and the bondholders of any changed circumstances to allow them to better protect their positions. EY, as auditors, should have been aware and reported that monies were not being deposited into the proper accounts according to their priority under the 'cascading waterfall' system. The failure to comply with this safeguard meant that monies could be, and in fact was, dissipated by Kamalul.

The disclaimers

[562] Two 'disclaimers' fall for consideration here. The first is that included by EY in its letter of engagement from Aldwich. Only EY and Aldwich are privy to that disclaimer which is essentially contractual in nature. The second disclaimer is the important notice found in the IM, which seeks to absolve, inter alia, MIBB and EY of all liability for the losses suffered by the bondholders. It is this latter form of disclaimer that was the subject matter of consideration in *Pesaka.* EY submits that the decision of the Federal Court in *Pesaka* is binding on this court and accordingly notwithstanding the existence of a duty of care and any possible breach, EY cannot be held liable for any losses suffered by the bondholder. We address each of these issues in turn.

Disclaimer in the letter of engagement between EY and Aldwich

[563] EY included a disclaimer in the letter of engagement dated 18 April 2003 which put on record that their work was to be done for the information of Aseam (ie MIBB) and set out the scope of their work. Before us, EY contended that their work was to prepare an 'Indicative Valuation' which could not be equated to an audit report. Accordingly EY could not be held to the higher accounting standards which apply to audits. It is pertinent that under the heading 'limitation of scope', EY stated as follows:

> We will assist you as described above based on information provided. You are responsible for providing all the necessary information relating to the proposed assignment. The authenticity, accuracy and completeness of such information provided by you, which we will rely on and which will form the basis of our advice and assistance, are your responsibility.
>
> Our review on the said forecast is solely for the purposes of ensuring that the accounting bases and calculations used in arriving at the forecast (for which the directors and management of Aldwich are solely responsible) have been properly compiled on the basis of the assumptions made by the directors and have been

presented on a basis consistent with the accounting policies normally adopted by Aldwich. We will also review the assumptions used for consistency.

Our work will not constitute an audit in accordance with approved Standards of Auditing in Malaysia. As such, our scope will not include procedures necessary to enable us to express an opinion on the forecast and financial information obtained and hence we will not express any audit opinion on such information.

Privity

[564] It is clear that this contractual disclaimer is made between EY and Aldwich. It does not have the same effect in tort in relation to the duty of care owed by EY to the bondholders. For the reasons we have stated above in relation to the statutory breaches occasioned by EY, we are of the view that the disclaimer would not operate to exclude EY's liability, which is clearly established under the SCA 1993. In other words, EY would be liable to the bondholders for breach of its statutory duties, notwithstanding this disclaimer, which is contractual in nature vis a vis EY and Aldwich.

[565] In the High Court, the bondholders relied on *Scruttons v Midland Silicones Ltd* [1962] 1 All ER 1 for the proposition that where it was held that a party not privy to the contract or agreement cannot rely on the terms of the said contract. Accordingly, the disclaimer did not affect the statutory liability occasioned by EY's assumption of responsibility vis a vis the bondholders.

[566] The 'protection' afforded to EY by the disclaimer does not extend to shield EY from liability vis a vis the bondholders' action as the latter were not privy to the contract. As such this disclaimer does not absolve EY from the allegations of negligence made against them by the bondholders, if negligence is indeed established.

Deflecting primary responsibility to Aldwich for the inaccuracy of the cash flow projections

[567] It is also apparent that the disclaimer seeks to place the onus of responsibility for the accuracy of information on Aldwich. However there is a distinction between specifying the limitations of the projections based on information provided by Aldwich and over reliance on such information such that the auditor does not undertake nor meet the basic professional standards of conducting an audit, or a review of the cashflow projections, in this case. This issue was examined in some detail by VK Rajah JA in *JSI Shipping*. It was pointed out that there are limitations inherent in the audit process in that they cannot guarantee the veracity of the financial information reported by the auditors. That is acceptable in a 'broad sense'. However this inherent limitation does not detract from an auditor's duty to undertake his professional duties of

review with an open and probing mind in accordance with the standards of a reasonable, prudent accountant as outlined in accounting standards. In the context of the present case that means that while the core financial information was provided by Aldwich, that did not mean that EY was to simply accept this information without any review whatsoever. And a disclaimer of negligence would not have the effect of negating or providing immunity from liability as a consequence of a failure to undertake a sufficient review. Such a review would include, for example a proper examination of the books of the company, or a review of the contracts in the instant case, such as the number of contracts available for long term business which could be assigned to Aldwich, the existence of non-assignment clauses in such contracts etc. These are the underlying bases for any form of projection of future business proceeds. It would be untenable to simply take the position that the cash flow projections as provided by the issuer itself were absolutely free from doubt and available to provide a fair and reasonable estimate of future profits.

Case-law

[568] As has been stated in several cases the function of an auditor is not simply to undertake a mechanical process of ascertaining that balances meet. He is not simply an 'adder-upper and subtracter'. His primary function is to ensure that errors of computation of disclosure or omission or straightforward untruths or misrepresentations are not made. That is essential, as in the instant case to ensure that 'false' information is not disseminated. If not to preclude such errors and potential falsity of information, the function of an auditor would be superfluous. So no such contractual disclaimer can or should operate to provide immunity against a fundamental failure to exercise reasonable standards of review and investigation which comprise the core duties of an auditor or accountant (see *In re London and General Bank (No 2)* [1895] 2 Ch 673 where the function of an auditor was considered and *Fomento (Sterling Area) Ltd v Selsdon Fountain Pen Co Ltd, Selsdon and Selsdon* [1958] 1 WLR 45; *United Project Consultants Pte Ltd v Leong Kwok Onn (trading as Leong Kwok Onn & Co)* [2005] 4 SLR 214 as relied on in *JSI Shipping*).

[569] Applying the same to the instant case it follows that the existence of a disclaimer stipulating that reliance is placed on Aldwich for the provision of financial data does not absolve EY of its fundamental duty to scrutinise with a probing eye, the efficacy and reasonableness of such data or to ascertain that there are no material non-disclosures which would inevitably affect the sanctity of the financial data provided. More so as that financial data would be relied upon by the SC to approve the programme in the first place, the other participants in the structure of the bond programme, such as the lead arranger and the trustee, as well as the numerous investors who would rely on those cash projections to determine whether or not to invest in the programme. To hold otherwise would be to render the function of auditors nugatory. On the facts of

this case it appears to us that notwithstanding the effect of the disclaimer vis-à-vis Aldwich and EY, it affords no immunity to EY in negligence, in relation to the sanctity of the information in the IM vis a vis the bondholders.

[570] To this end, EY's disclaimer to the effect that it would not adhere to accounting standards in undertaking its task of review of the projections, does not exonerate it from pointing out deficiencies in the projections, particularly when it subsequently voluntarily agreed to the insertion of its participation, review and effective approval of these figures in the IM. That inclusion in the IM stamped the cash-flow projections with an affirmative or positive stamp of reasonableness, which in turn was relied upon by potential investors. In short it is not possible to state on the one hand that the figures appear to be reliable and on the other hand maintain that you are unable to state that the figures are in fact reliable. The disclaimer can only logically mean that EY does not verify the absolute accuracy of the financial data which is primarily within the knowledge of Aldwich, but that having examined the same, the figures are reasonable and not considerably inaccurate. Accordingly, conclusions arrived at by the use of such data also appear to be reasonable.

(It should be emphasised in this context that the disclaimer referred to here is the contractual disclaimer and not the important notice in the IM.)

[571] For these reasons we are of the view that EY is not entitled to invoke the disclaimer to defer liability to Aldwich for its failings in conducting the review which resulted in exaggerated cash flow forecast and projections. Even in the letter of engagement itself, EY stated it would 'review the assumptions for consistency'. Further, as discussed above, as a member of the DDWG, EY assumed additional responsibilities to ensure no inaccurate statements were included in the IM.

The disclaimer in the IM -does it absolve EY of liability?

[572] The relevant portion of the IM in relation to limiting or negating the liability of EY is as follows:

> This Information Memorandum is not, and should not be construed as, a recommendation by the Issuer, the Lead Arranger or any other party to participate in the Programme. *Further neither the Issuer or the Lead Arranger nor any of their respective employees or agents makes* or gives or purports to make or give *any representation* or warranty, expressed or implied, *as to the merits of the Programme or the purchase or subscription of the Senior Bonds* and the Junior Notes thereof, *the creditworthiness or financial condition or otherwise of the Issuer* or any other person mentioned in this Information Memorandum. This Information Memorandum is not a substitute for, and should not be regarded as, an independent evaluation and analysis and does not purport to be all-inclusive. Each recipient should perform and is deemed to have made its own independent investigation and analysis of Aldwich, the Programme and all other relevant matters, including but not limited to the

information and data set out in this Information Memorandum and each recipient should consult its own professional advisers ...

... All statements contained in this Information memorandum that are not statement of historical facts constitute 'forward looking statements'. These statements identified by forward looking terms such as 'expect', 'believe', 'plan', 'intend', 'estimate', 'anticipate', 'may'; 'will'; 'would'; 'could' or similar words include, among other things, discussion on the Issuer, its business strategy and expectation concerning its position in the Malaysian economy, future operations, profitability, liquidity, capital resources, financial position and settlement of indebtedness. *All these statements are based on estimates and assumptions made by the Issuer that, although believed to be reasonable, are subject to risks and uncertainties* that may cause actual events and the future results of the Issuer, the Issuer's holding company and its subsidiary companies to be materially different from that expected or indicated by such statements and estimates and no assurance is given that any of such statements or estimates will be realized. In light of these and other uncertainties, the inclusion of a forward looking statement in this Information memorandum is not a representation or warranty by the Issuer or any other person that the plans and objectives of the Issuer will be achieved ...

[573] EY falls within the ambit of the IM as an agent of the Issuer. The SC as discussed earlier therefore exercises control and supervision over, inter alia, EY, as borne out by ss 32B and 38 of the SCA 1993. The purport of this important notice is that it points out to potential investors that they are not entitled to, and should not rely on the 'forward looking' estimates, forecasts and predictions as being infallibly and inevitably true and inaccurate. In short it points out the risks inherent in investing in the programme. However it is equally evident that the forecasts and estimates provided are stated to be 'reasonable'. That term must exclude untruthful, dishonest or any deliberate misrepresentation of data, as that is the purport of the SCA namely to ensure that false or inaccurate information is not disseminated in the IM. To that extent the IM provides no immunity for false information.

[574] The issue that falls for consideration is whether EY is exempt from liability by reason of the important notice, more particularly in view of the Federal Court case of *Pesaka* (discussed above). Firstly it must be pointed out that *Pesaka* dealt primarily with the exoneration of liability of the lead arranger in that case, namely KAF. No auditors were party to the litigation in that case. However it can be argued that as 'agents' covers the auditors/accountants, the reasoning in that case ought necessarily to encompass EY in the instant appeal. That indeed was the proposition put forward. Having considered this issue we would reiterate, adopt and re-affirm our judgment as set out in paras 282–289 of this judgment. To recapitulate, in summary, we concluded that having studied the ratio of the decision in *Pesaka,* the nub of the judgment is that:

(a) an IM is not a contractual document;

(b) s 65 of the SCA 1993 is inapplicable to an IM because s 65 applies to agreements;

(c) as s 65 is inapplicable to IMs, a lead arranger may include the important notice as a disclaimer in the IM; and

(d) the important notice is not void and ought to be given effect.

[575] We pointed out that the central feature in *Pesaka* was the construction and application of s 65 which does not feature in this appeal. The bondholders do not found their case on s 65, nor on the basis that the IM is a contractual document.

[576] As we have pointed out the bondholders' case against EY is founded in negligence and breach of statutory duty as has been discussed extensively above in relation to ss 32B, 38(3), 57 and 153 of the SCA 1993. At this juncture we are dealing with negligence.

[577] Does the IM give the auditors immunity from this claim or afford a defence to the bondholders' claims?

[578] The bondholders' claim against EY is premised on negligence. However in detailing whether a duty of care exists and whether a breach and damage is suffered thereby, there is a necessary incorporation of the statutory duties owed by an auditor to the bondholders. In short, in determining the issue of negligence, it is not tenable, to our minds to artificially excise or ignore the provisions of the SCA 1993 in determining whether a duty of care exists. This may be explained as follows. In the course of undertaking an audit for the issuance of securities which are to be made available to potential investors under the auspices of the SCA 1993, and overseen and reviewed by the SC, an auditor is bound to comply with the provisions of the SC in this context. As a member of the DDWG and given the verifications undertaken by EY both pre and post-bond issuance, it is difficult to adjudge or apply standards of care which do not encompass the statutory duties of auditors under the SCA 1993.

[579] Therefore in determining whether liability arises under the cause of action framed in negligence by the bondholders in the context of the issuance of securities under the SCA 1993, the provisions of that Act, insofar as they relate to the duties of an auditor, comprise an integral part of the claim.

[580] It would be entirely artificial to postulate and accept that for the purposes of an action founded in statutory breach of duty by an auditor, the provisions of the SCA 1993 apply, but that when it comes to the common law cause of action of negligence, the provisions of the SCA 1993 should be ignored or artificially excised from consideration. In the Malaysian context, the

provisions of the SCA 1993 comprise an inextricable part of the duties and obligations of the auditor who undertakes or assumes responsibility as a participant in the issuance of securities for potential investors, albeit sophisticated or retail. The position in other jurisdictions may well differ. Most cases discuss the validity and efficacy of exemption and disclaimer clauses in the context of liability in contract or tort, without the inclusion of statutory provisions. It may be that such stringent statutory provisions do not subsist. But in Malaysia it is a reality that the SCA 1993 and CMSA 2007 impose such duties and responsibilities on auditors assuming responsibility for issuance of securities, to varying extents. And that comprises the basic fact matrix and underlying statutory landscape within which negligence is to be considered and analysed. Therefore the cause of action in negligence by the bondholders against EY is to be viewed with consideration of, and in the context of the SCA 1993.

[581] We have in the previous part of the judgment dealing with statutory breaches by EY concluded that EY breached ss 32B and 38(3) and thereby ss 57 and 153. EY failed to alert the SC or more importantly the bondholders of the alteration in the ring-fencing structure prior to the issuance of the bonds, in much the same vein as MIBB. Although primary responsibility for this must go to MIBB, EY also owed a duty to report the material change which effectively destroyed or put at risk the original ring fencing structure of the programme to the bondholders and the SC. It failed to do so, despite the duties it undertook as a member of the DDWG and in its participation in acquiescing to the waiver of the conditions precedent. Neither did it comply with the continuing duty to report aberrations and failures under s 85, post-bond issuance.

[582] These are not matters that comprised a part of the *Pesaka* case and to that extent the statements in that case are not relevant to the current matter before this court. We would therefore concur with the learned judge that *Pesaka* is entirely distinguishable and not relevant to the instant cause of action of the bondholders against EY.

[583] We reiterate the statements we made earlier when distinguishing *Pesaka,* namely that the statutory provisions relied upon in the instant appeal in relation to EY were neither considered nor relevant in *Pesaka.* The Federal Court there considered the application of s 65 to the IM. There was no consideration of the provisions discussed here. Nor was there argument put forward nor consideration of the importance of the statutory provisions discussed here which underscore the fundamental importance of complete disclosure to all investors, albeit sophisticated investors or ordinary investors in light of the overarching regulatory framework of the SCA 1993.

[584] EY as an agent under the SCA 1993 plays an important role to ensure that investors such as the bondholders are given truthful and accurate disclosure of all material facts so that they can go on to make a decision as to whether or not to invest or subscribe in the subject bonds. Even sophisticated investors are entitled to the truth in terms of the investment they are about to embark upon.

[585] This, EY failed to do in that it was negligent in relation to both the valuation of the business and the review of the projections which comprise the cornerstone of the investment decision. Even an independent analysis undertaken would rely primarily upon the valuation and to some extent on the projections, which are stated in the IM to be 'reasonable'. The fact that these estimates were in fact vastly inaccurate, as found by the trial judge (which we accept and concur with) justifies the trial judge's finding of negligence.

[586] Perhaps more significantly the fact that EY too failed to provide full disclosure at various times throughout the programme until default, also lends to the finding of negligence. The failure to point out the destruction of the ring-fencing structure, the failure to review or even consider the manner in which funds were dealt with such that the cascading waterfall priority was never followed and the failure to detect the considerable sums of money which were siphoned from Aldwich during the nine year tenure of the programme all evidence negligence. The disclaimer whether contractual or the important notice do not, in our view provide immunity as argued by EY.

[587] As argued in relation to MIBB, if the Important Notice had the effect that the parties now seek to place on it, it would render the statutory provisions of the SCA 1993 (and now CMSA 2007) entirely nugatory. Neither can the protection so afforded, which is primarily to protect the advisers and issuer against the inherent risks of investment, be utilised to circumvent the relevant statutory provisions of the SCA 1993 (and now CMSA 2007). We are therefore in agreement with the trial judge's findings that the Important Notice does not affect EY's liability by affording it immunity.

Case-law from other jurisdictions regarding disclaimers and third parties

[588] According to the learned authors of *Clerk & Lindsell on Torts* (20th Ed, Sweet & Maxwell and Thomson Reuters, 2010) at para 10–197, accountants may owe liability to third parties where their advice is clearly meant for the benefit of the third party and it is clear that the third party would rely on it. The authors cited cases such as *JEB Fasteners Ltd v Marks, Bloom & Co (a firm)* [1981] 3 All ER 289 (auditors preparing accounts for a company to be shown to a would-be buyer of the business-held to owe a duty to the would-be buyer), *Killick and another v PriceWaterhouseCoopers (a firm)* [2000] All ER (D)

928; [2001] PNLR 1 (where shares were sold at a price fixed by valuation, the accountants performing the valuations may be liable to either party) and similarly *Pearce v European Reinsurance Consultants and Run-Off Ltd and others* [2005] EWHC 1493 (Ch); [2006] PNLR 8.

[589] In arriving at our conclusion that the disclaimer in both the letter of engagement and the IM do not serve to exculpate or negative liability on the part of EY, we have taken into consideration the many decisions cited by EY, including *Caparo, Hedley Byrne* and *Bannerman.*

[590] In *Caparo*, the House of Lords held that even where there was an assumption of responsibility by an accountant who knew that the report would be relied upon by a third party, liability could be limited by the addition of a disclaimer. In the instant case, that would mean that the disclaimer in the letter of engagement or the IM would have the effect of negativing liability. However as we have discussed at some length above, EY took on the role of an auditor in the context of a public offering of securities regulated by the SC under the SCA 1993. Therefore it is firstly distinguishable from the fact situation in *Caparo.* More significantly however *Caparo* is not authority for the proposition that a disclaimer, no matter how widely worded, is effective against specific statutory provisions requiring full disclosure and a minimum level of accuracy.

[591] In the case of *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL) ('Hedley Byrne'), the respondents gave bankers who were acting on behalf of the appellants a favourable reference regarding a customer of the respondents. The reference included a disclaimer of responsibility. The House of Lords held that even though a duty of care may have arisen, the disclaimer of responsibility negated the implication of such a duty. We would rely on the reasoning above in relation to *Caparo* to conclude that the disclaimer relied upon by EY does not have the same effect of limiting liability for EY, in countering a claim of negligence by the bondholders by reason that the present appeal deals with a public offering of securities regulated by statute, and which therefore provides for what are effectively statutory responsibilities to be undertaken by EY.

[592] Similar reasoning would apply to distinguish the Scottish case of *Bannerman,* which is heavily relied upon by EY. In that case, the pursuers (applying Scottish terminology) claimed damages for losses allegedly sustained by them in consequence of negligence on the part of the defenders in the auditing of a company and of fraud on the part of an individual, whom, they alleged, was one of the defenders' employees acting in the course of his employment with them at the material time.

[593] It was held that a duty of care could arise if the party who relied on the information could prove that the auditors knew about the purpose of the request for information, or intended that the information be relied upon by a third party, thereby establishing proximity of relationship between the auditor and the third party. A disclaimer was not included in the report but if it had been included, it was held that it could have been valid against the pursuers, who were third parties. In short it was held that a disclaimer is effective as against third parties.

[594] Again we would conclude that this case like the others relates to the exoneration or limitation of liability of auditors in purely contractual and tortious situations. It does not incorporate features of statutory responsibility. This is a significant distinguishing feature by reason that Parliament has thought it fit, in the context of Malaysia to introduce such statutory responsibilities with the ultimate aim of ensuring that investors are accorded the opportunity of full disclosure and as much accuracy and truthfulness as is reasonably possible in making a decision on investment. Such statutory provision has extended (albeit to a lesser extent) to even sophisticated investors such as the bondholders in the instant case. This is evident from the statutory provisions we have discussed above. Therefore it is not tenable to apply the law relating to disclaimers in a purely contractual and tort based factual scenario to expound a principle or opinion expressed within that context. In other words, if in *Caparo, Hedley Byrne or Bannerman,* if there had been a statute regulating the form of disclosure in the context of the public offering of securities, would the decision be the same? It is not possible to so conclude. To that extent the application of the law as expressed in that case cannot be directly imported into the present context.

[595] We would express the same reasoning when considering the English case of *Barclays Bank plc v Grant Thornton UK LLP* [2015] EWHC 320 (Comm) (QBD) ('Grant Thornton'). It is cited as authority for the proposition that a disclaimer clause in a contract between two sophisticated commercial parties would be capable of being relied upon and would elide liability for a breach of duty of care.

[596] In summary, the facts are that Grant Thornton UK LLP carried out audits for the VEH Essen Hotels Group ('VEH') in 2006 and 2007. These reports were relied upon by Barclays Bank, in consideration of their continuing loan facility to VEH, in the sum of £250m. VEH later became insolvent and was unable to repay the loan facility to the Barclays. There were extensive disclaimer clauses specified in the audit. The question for consideration was whether the disclaimers would negative the duty of care which was found to subsist. It was held that the existence of a duty of care is tied up with the issue of the disclaimer which would, if effective, negate any such duty. The rationale

was that there could not be an assumption of responsibility in circumstances where such assumption is specifically negated by the accountant.

[597] Applied to the present factual matrix that would translate to whether the contractual disclaimer in EY's letter of engagement or the important motice in the IM would negative the duty of care owed to the bondholders. Again in light of the express provisions of the SCA 1993 which impose duties which cannot be 'excised' when considering the scope of duties and obligations undertaken by EY, the answer would be that these disclaimers do not and would not negative such liability as in the public offering of securities involves statutory obligations which cannot simply be negative by the inclusion of a disclaimer. We have earlier analysed the issue of whether these statutory obligations would comprise an element of negligence. As concluded earlier these statutory obligations would necessarily comprise a part of the legal duty of care as they comprise an inextricable part of EY's functions when assuming responsibility as auditor for a public offering of securities under the SCA, requiring approval of the SC.

[598] In summary therefore, the most significant feature which distinguishes these cases from our present appeal is that none of those cases deal with or reflect a situation where a report or review by an auditor or accountant is expressly undertaken, and known to be undertaken for utilisation in a public offering of securities to potential investors, specifically under a statute regulating such an offering of securities. Therefore the effect of a disclaimer under these circumstances has not been considered in any of these cases. The cases deal primarily with the role of disclaimer clauses in relation to third parties in a common law situation, premised in tort or contract. No statutory provisions came into play in those cases.

Causation

[599] Having concluded that the disclaimer clauses do not exonerate EY from liability in negligence it next falls to be considered whether causation is established. We reiterate and adopt the position in law relation to MIBB and the application of the but for and proximate cause test. Applying the same, if not for:

(a) EY's valuation which was far in excess of the actual value of the business, as set out in the IM;

(b) EY's failure, notwithstanding its statutory obligations, to disclose the fact that the waiver of the CPs had resulted in jeopardy to the ring-fencing structure of the bond programme;

(c) EY's failure to monitor or highlight the failure of AEM, Kamalul and Aldwich to adhere to the cascading waterfall priority structure in relation to the proceeds of business received by AEM and/or Aldwich; and

(d) EY's failure to report any concern or the foregoing matters,

the losses arising from Kamalul's dissipation of funds from the accounts of AEM and Aldwich to which he had full access would not have occurred. Kamalul could have such access and could remove monies because the original protective ring-fencing structure was destroyed by the waiver of the CPs, contrary to what was stated in the IM and thereby communicated to the bondholders. It was also contrary to the structure reported to the SC. EY did not disclose this at any juncture. This coupled with the lack of monitoring of the five accounts and the failure to report transgressions which EY was alerted to as evidenced by reports from the auditing teams, contributed materially to the losses suffered by the bondholders, as monies were easily siphoned off from AEM and Aldwich.

[600] The fact that MIBB was found to be primarily liable by the trial judge does not, in our view, exonerate EY. We concur with the trial judge that EY is responsible, albeit to a lesser extent. We see no reason to interfere with Her Ladyship's ultimate finding that EY is 20% liable for the losses suffered by the bondholders.

(D) THE APPEAL BROUGHT BY ALDWICH, AEM AND KAMALUL (APPEAL NO W-02(NCC)(W)-1708–08 OF 2017)

[601] The bondholders' case against Aldwich who is the issuer of the bonds, is premised on default in the repayment of monies due to it. This arose from a failure to lodge into the DSRA sufficient monies to enable the repayment of one of the semi-annual tranches due, resulting in default and an acceleration of all monies due over the 15 year period, as explained above. Therefore the causes of action are premised on:

(a) breach of contract; and

(b) breach of statutory duty by contravening s 38 of the SCA 1993 in relation to the material omissions and hence false and misleading statements in the IM.

Cause of action in breach of contract — Specific breaches and findings by the learned judge

[602] Aldwich, as the recipient of the financing from the bondholders, was under a contractual duty to repay the monies it owed under the terms of the bond programme. The contractual duty on the part of Aldwich to repay the

bondholders is found, inter alia, in the trust deed executed between Aldwich and the trustee on behalf of all the bondholders.

[603] The terms of repayment under the bond programme as documented in the bond contracts, particularly the trust deed required repayment by Aldwich in two semi-annual tranches, over a 15 year period.

[604] The trial judge found that by reason of Aldwich's default in making the requisite repayments as explained earlier, a trigger event was occasioned first, followed by an event of default. The event of default was called by the bondholders through Mayban Trustees, under the terms of the trust deed. As a consequence, Aldwich was bound to make repayment of the entire sum due, namely RM242,432,497.16 with immediate effect.

[605] In so concluding the trial judge relied on, inter alia:

(a) *cl 3.1 of the trust deed*, where Aldwich covenants with the trustee that the bonds will be redeemed in full at nominal value by it on the requisite maturity dates, failing which the bonds are to be redeemed at what is known as the trigger event redemption value prior to the final maturity date on the happening of a trigger event; and

(b) *cl 11.1 of the trust deed*, which provides that if Aldwich makes default in the payment of any money owing in respect of the bonds under the trust deed as becomes due and payable, then the trustee may if directed by a special resolution of the bondholders declare that all sums have become due and payable.

Aldwich's appeal

[606] It is contended for Aldwich that:

(a) the trial judge erred in finding liability in full against Aldwich because the bondholders had no locus standi to institute this suit against Aldwich;

(b) the trial judge erred in finding that the bondholders had a statutory right to recover their losses under ss 32B and/or 38 of the SCA 1993 because those sections are penal provisions and therefore do not create any civil liability against Kamalul; and

(c) the trial judge failed to appreciate that the bondholders only have a right to limited recourse against Aldwich as provided under cl 13.1 of the trust deed

[607] That is the primary breach, as found by the learned judge, namely the failure of Aldwich to redeem the bonds in the sum of RM242,432,497.16 from February 2010.

[608] From the sequence of events following upon the calling of an event of default on 18 February 2010 by reason of a series of breaches by Aldwich, Aldwich's liability and indebtedness is beyond dispute. Although Aldwich and Kamalul sought to challenge the validity of the Event of Default in two earlier suits, the learned Judge correctly found that Aldwich is estopped by the doctrine of res judicata and estoppel from challenging the validity of the Event of Default in the present proceedings.

[609] More significantly the trial judge found that Aldwich had admitted its breaches of the bond covenants in 3 contemporaneous letters to Mayban Trustees namely on 11 February 2010, 24 February 2010 and 25 February 2010. As expressly found by the trial judge Aldwich admitted that it was in breach of the covenant to obtain acknowledgements to the Notices of Assignment and Letters of Novation from the outset. It further accepted that it owed the bondholders the redemption value sum of RM242m when it stated that as an Event of Default had been called it would comply where possible with payment instructions issued by Mayban Trustees. And it admitted that it had breached various terms of the Trust Deed by failing to credit revenue into the revenue account from the very outset in 2004.

The issue of locus standi

[610] Aldwich contends that the trial judge erred in failing to concur with their stance that the bondholders had no locus standi to institute this suit against it. It is contended that the Trust Deed is structured such that only the trustee, Mayban Trustees may institute the suit, and not the bondholders. Reference is made to cl 12.4 of the trust deed.

[611] The trial judge dismissed this contention stating that cl 12.4 had no application where Mayban Trustees had themselves breached the provisions of the trust deed and acted in breach of contract and were themselves the subject matter of a suit. We concur with the trial judge that it would indeed be a ridiculous proposition to suggest that the trustees should bring an action against themselves as well as Aldwich, together with the bondholders.

[612] The trust deed is executed between Aldwich, Mayban Trustees and MIBB. Mayban Trustees does represent the interests of the bondholders. Where the cause of action against the defaulter, ie the issuer, is for a mere breach of contract in terms of failing to make repayment, it would follow that it would be correct for the trustees to institute the action. But as reasoned by the

bondholders and accepted by the trial judge, what is the position when the trustees themselves are sued for breach of trust. It is not a tenable proposition nor reasonable for the bondholders to expect, and for Mayban Trustees to accept that it is bound to join the bondholders in a suit against the primary defaulter, Aldwich and itself.

[613] We have no reason to disagree with the trial judge's reasoned findings in this respect as it is evident that Aldwich failed to comply with its primary obligations under the bond contracts resulting in losses suffered by the bondholders as claimed.

[614] It is equally untenable that a separate suit be taken out by the bondholders against Mayban Trustees, while Mayban Trustees institutes action against Aldwich. Given the complexity of the factual and legal matrix in this case, there would be complete chaos. Moreover the same witnesses would have to testify twice. And there would be a grave risk of differing decisions being handed down. The multiplicity of proceedings decry such a cause of action. We therefore find this ground of appeal by Aldwich entirely without merit.

[615] An arguable contravention of cl 12.4 as the trial judge found, does not preclude the plaintiffs from maintaining this suit. It also has to be borne in mind that cl 12.4 was drafted with the underlying assumption that the trustee was acting entirely in compliance with the provisions of the trust deed. Clause 12.4 cannot be construed as originally drafted, where Mayban Trustees as the trustee is itself in breach. Therefore literal compliance with cl 12.4 in instituting an action against Aldwich, where the entire bond programme has collapsed due to the collective failure of both Aldwich and, inter alia, the trustee, is with respect, misconceived. Accordingly the trial judge's conclusion that the bondholders possess locus standi to sue is correct. The trust deed cannot be read in a manner that precludes the bondholders from recovering their losses. The bondholders' right of recovery was not removed by cl 12.4 of the trust deed, which it must be remembered was undertaken for their ultimate benefit. How can it then be utilised to preclude such a right? The trustee is the 'vehicle' or the medium through which their rights are vindicated under the trust deed. If the trustee itself is implicated in failing to adhere to the provisions of the trust deed, can it reasonably be concluded that this deprives the bondholders of their rights of recourse?

[616] To illustrate this point by way of an example, we make reference to the judgment of the Supreme Court of Appeal of South Africa in *Gross v Pentz* [1996] ZASCA 78. In relation of the rights of beneficiaries to sue the trustee and third-parties (on account of the trustees own failure to sue them), Corbett CJ observed as follows:

> At this point, however, I should stress that a distinction must be drawn between

> actions brought on *behalf* of a *trust* to, for instance, recover trust assets or to nullify transactions entered into by the trust or to recover damages from a third party, *on the one hand, and, on the other hand, actions brought by trust beneficiaries in their own right against the trustee for maladministration of the trust estate, or for failing to pay or transfer to beneficiaries what is due to them under the trust, or for paying or transferring to one beneficiary what is not due to him ...*
>
> *This would appear to be a representative action since the relief claimed was restoration to the trust of the loss caused by the negligence of the trustees. Consequently the plaintiff, as beneficiary, would have had locus standi only on the basis of the Beningfield principle.* The right of the plaintiff to sue was not questioned. (Emphasis added.)

[617] The fact that the trustee is not initiating the action or that it is not a plaintiff together with the bondholders is fully explained by the fact that the trustee itself is a defendant in the suit. Ultimately it is an adjectival, and not substantive matter.

Limited recourse

[618] Aldwich's complaint here is that the trial judge failed to give effect to cl 13.1 of the trust deed which provides for 'limited recourse' against Aldwich. That limitation, it is contended, extends to the secured property and no further. All shortfall, it is provided, is to be borne by the bondholders 'in accordance with the priority specified in Clause 13.2'.

[619] The trial judge, it is contended, erred in failing to give effect to this clause by holding that Aldwich was liable for not disclosing cl 13 of the trust deed to the SC or in the IM. That means that the bondholders had no knowledge that recourse for recovery of monies they had loaned to Aldwich and which had become due to them under the bond programme was limited to the quantum recovered from a realisation of the secured property. The trial judge held firstly that:

(a) the failure to disclose this important clause in the trust deed amounted to a contravention of s 32B as a consequence of which Aldwich was liable to the bondholders under the provisions of ss 57 and 153 of the SCA 1993;

(b) it exposed Aldwich to liability under s 38 of the SCA 1993; and

(c) the limitation clause namely cl 13 is void pursuant to s 65 of the SCA 1993 as it purports to exclude or restrict the liability of a person for a contravention of ss 55, 57 or 58 for loss or damage under s 153.

[620] Aldwich maintains that the trial judge erred because:

(a) the bondholders have not shown any legal requirement for every term of the trust deed to be contained in the IM;

(b) a copy of the trust deed was lodged with the SC on 12 August 2003 before the issuance of the bonds on 15 August 2003 and therefore the subscribers were or ought to have been aware of cl 13 of the trust deed;

(c) even if there was non-disclosure s 57 should be read as being subject to cl 13 of the trust deed.

(d) the learned judge erred in invoking s 65 as cl 13 does not contravene the section; and

(e) s 153 has not been breached as there was no contravention of Part IV of the SCA 1993 by Aldwich

[621] We consider these complaints in turn:

(i) *does every term of the trust deed have to be in the information memorandum?*

(ii) *a copy of the trust deed was lodged with the SC on 12 August 2003 before the issuance of the bonds on 15 August 2003 and therefore the subscribers were or ought to have been aware of cl 13 of the trust deed.*

[622] It borders on absurdity to suggest that every term of the trust deed is to be reflected in the IM. However it is equally irrational to suggest that a clause as significant as cl 13 does not warrant inclusion in the IM. Clause 13 provides a significant limitation to the quantum of loss that may be recovered from the issuer. It takes away the bondholders right of recourse to full recovery. It takes away their entitlement to recover monies they had loaned to Aldwich. The removal of such a significant right naturally requires disclosure to the bondholders.

[623] In this context the primary document relied upon by the bondholders is the IM, as has been repeatedly stated in the course of the judgment. If there was such a massive removal or exclusion of their rights of recovery this was an essential matter that required disclosure from the outset in clear language in the IM. In point of fact it should have been a significant feature of emphasis in a manner akin to the important notice. However this was not done.

[624] The fact that Aldwich suggests that the trust deed was available three days prior to bond issuance in itself shows that there was no attempt made to disclose this important clause sufficiently or at all. It instead smacks of an attempt to 'sneak' in a clause to Aldwich's benefit and the serious detriment of the bondholders.

[625] Without the consensus of the bondholders, such a removal of rights is untenable. The trial judge therefore cannot be faulted for invoking s 65 as the

failure to disclose the same attracts liability under s 32B affording the bondholders relief under ss 57 and 153. The attempt to preclude liability vide cl 13 in any event cannot prevail over the statutory provisions of ss 57 and 153. Any attempt to do so is rightfully void as envisaged by s 65.

[626] As this is a trust deed, the invocation of s 65 cannot be faulted either.

(iii) even if there was non-disclosure s 57 should be read as being subject to cl 13 of the trust deed;

(iv) the learned judge erred in invoking s 65 as cl 13 does not contravene the section

[627] Aldwich provides no legal basis for its contention that s 57 SCA 1993 should be read as being subject to cl 13 of the trust deed. This indeed envisages that a statutory provision should be voided or not given effect, in favour of a provision in a trust deed. This is simply untenable. It would enable a simple circumvention of statutes to allow parties to contract out of statutes. It is clear that s 57 must and does take precedence of cl 13. We also made this point in paras 293–294 of this judgment.

[628] It follows from the above submission that any attempt to void liability under the SCA is rendered void by s 65. The use of the section by the trial judge cannot therefore be faulted.

(v) *s 153 has not been breached as there was no contravention of Part IV of the SA by Aldwich*

[629] It is evident from this judgment that the trial judge found, and we concur that there were breaches of, inter alia, ss 32B, 38 and 57 of the SCA 1993 all of which fall within Part IV of the SCA 1993. This submission has no merit whatsoever and needs no further consideration.

Conclusion in relation to Aldwich

[630] There is no reason whatsoever for appellate intervention in relation to the clear liability of Aldwich as issuer to the bondholders for the sum claimed. It is the balance sum remaining due and owing to the bondholders under the programme for monies loaned to Aldwich. Relevant deductions have been made in respect of properties realised.

[631] The matters raised above have no merit and we are satisfied that the trial judge made no error whatsoever whether on the facts or in law in concluding that Aldwich is wholly liable for the losses suffered by the bondholders.

[632] Ultimately Aldwich borrowed approximately RM177m from the bondholders through the issuance of bonds. Aldwich failed to repay the event of default redemption value sum when an event of default was called. That event of default was found to be valid by the trial judge. Accordingly Aldwich's liability for the sum claimed by the bondholders is clear.

AEM and Kamalul's appeal

[633] The trial judge found AEM and Kamalul liable for breach of trust and constructive trust. Kamalul was additionally found liable for a statutory breach of duty. Kamalul's counterclaim for RM383,861,400 was dismissed.

Kamalul's and AEM's grievances

[634] The grievances are that the trial judge erred in:

(a) lifting the veil of incorporation of Aldwich and AEM and thereby finding Kamalul liable for their actions and/or omissions;

(b) transfer of RM166m from Aldwich to AEM and a payment of RM16.7m to Kamalul

(c) finding that AEM had a monies account with HSBC USA;

(d) finding Kamalul statutorily liable under s 32B SCA in failing to disclose the supplemental BSAs; and

(e) finding that the transfer of the junior notes from AEM to Kamalul was not done at arm's length.

(a) Lifting the veil of incorporation of Aldwich and AEM and thereby finding Kamalul liable for their actions and/or omissions

[635] Kamalul complains, inter alia, that the trial judge in piercing the corporate veil as this can only be done if there is some impropriety of the person in control of the company, but not just if the company's wrongdoing is a breach of contract. It is further contended that the impropriety must be linked to the use of the company's structure to avoid liability and the bondholders are bound to establish both control of the company and impropriety (citing *Prest v Petrodel Resources Ltd* [2013] 4 All ER 673; [2013] UKSC 34 where Munby J's decision in *Faiza Ben Hashem v Abdulhadi Ali Shayif and another* [2008] EWHC 2380 (Fam) was cited).

[636] At paras 122 to 123 (which spans several pages) the trial judge made reasoned findings on the evidence that Kamalul was the alter ego of Aldwich and AEM in that he was the directing and controlling mind of these companies. This significant finding is not disputed. This finding and the

findings of fact on which such a conclusion was reached, are essential to support the legal basis for the piercing of the corporate veil. They include the following findings of fact by the trial judge:

(a) Kamalul through his substantial shareholding in AEM (as we discussed at the outset) meant that he effectively owned and controlled the company;

(b) all major decisions of AEM could only be taken by him;

(c) he and his wife controlled the board; he admitted that AEM was 'his' company;

(d) he admitted that he 'effectively owned' Aldwich and AEM;

(e) he stated in his evidence that he was individually responsible for the accuracy and adequacy of the statements made in the IM;

(f) all statutory declarations in Aldwich's audited financial statements for FYE 2003 to 2009 were signed by him;

(g) DW8 (Pushpanathan) agreed that Kamalul was the 'principal personality of both companies'; and

(h) the WOR plant was built by AISB, that was part of the Aldwich group and owned by Kamalul.

[637] On the factual basis set out above, which is apparent from the evidence on record, the trial judge cannot be faulted for her finding that Kamalul is the alter ego of the company. This is consonant with the law — simply that he had absolute control of the two companies and made all major decisions in relation to the two. He was the archetypal 'puppet master' as described in *Wallersteiner v Moir, Moir v Wallersteiner* [1974] 1 WLR 991. We find no reason to interfere with Her Ladyship's reasoning on this front.

[638] Moving on to the law, Kamalul sought to rely on *Prest v Petrodel Resources* to maintain that the case set out six principles amongst which is the contention that 'the corporate veil can be pierced if there is some impropriety but not just if the company's wrongdoing is breach of contract'. Further that the impropriety had to be linked to the use of the company's structure to avoid liability.

[639] The trial judge explains in her judgment that she could not find any such allusion or statement in *Prest v Petrodel Resources*, namely that the lifting of the corporate veil was not available where the cause of action was premised on a breach of contract. Similarly Her Ladyship clarified that the Federal Court in *Gurbachan Singh s/o Bagawan Singh & Ors v Vellasamy s/o Pennusamy & Ors (on their behalf and for the 213 sub-purchasers of plots of land known as PN35553,*

Lot 9108, Mukim Hutan Melintang, Hilir Perak) and other appeals [2015] 1 MLJ 773 made no such proposition. It is evident that the bondholders' case against Kamalul and AEM is not based on breach of contract but on impropriety, namely that Kamalul as the controlling mind of Aldwich and AEM wrongfully and dishonestly and/or fraudulently and/or in breach of trust directed and caused Aldwich to commit various breaches of the bond covenants. The trial judge quoted this and made reference to the bondholders' claim in determining this. In doing so, Her Ladyship was again, with respect, entirely correct.

[640] We find no merit in this submission because the foregoing comprises a clear plea of impropriety which involved the wrongful use of the corporate structure of Aldwich and AEM. There was a failure to remit the business proceeds received by AEM to Aldwich. This amounts to a wrongful utilisation of the corporate structure, given the intended and represented bond programme. It was specifically put to Kamalul that he diverted RM16.7m of Aldwich's monies, thereby depriving Aldwich of that sum which could have been credited into the DSRA. While Kamalul disagreed it is clear that the act of diversion of monies rightfully due to Aldwich is, wrongful. The use of these monies was never explained by Kamalul which more than justifies a finding of impropriety through the use of the corporate structure through which Kamalul maintained control over the movement of funds. And it is this loss of funds that comprises the basis for the entire claim in this suit. The trial judge made numerous other findings of impropriety which we do not propose to set out in detail here.

[641] As such Kamalul and AEM's submissions that the trial judge erred in fact and in law in piercing the corporate veil is astounding. It ignores the reality of the compendious amount of evidence adduced in the course of this trial, which AEM and Kamalul were simply unable to rebut. That evidence shows beyond dispute that monies which were meant to be placed in Aldwich's reserve account were diverted. In this context the trial judge correctly made reference to exhs P5 and P7 adduced by the bondholders which establishes as a matter of fact that monies totalling RM166m and RM16.7m were transferred out from Aldwich's disbursement account to AEM and Kamalul respectively. This is what the bondholders were able to trace, from a laborious and painstaking analysis of all of the bank statements made available to them during discovery. In other words, these monies which should have gone into Aldwich's account towards, inter alia, repayment of the bondholders, did not.

[642] However there was no explanation forthcoming from Kamalul as to where or how these monies were used aside from bare averments of alleged repayments to financial institutions. Kamalul stated that he utilised these monies for repaying the drawing down of AEM's Islamic acceptance bill facility

or loans allegedly extended by him. However, no documentary evidence whatsoever was produced to substantiate these oral averments.

[643] On the contrary the High Court in Shah Alam in *Maybank Islamic Berhad v Aldwich Enviro-Management Sdn Bhd* [2015] MLJU 1977; [2016] 1 AMCR 272 found Aldwich, AEM, Kamalul and 2 others liable for the tort of deceit, negligent misrepresentation, negligence and breach of contract by reason of Aldwich and AEM's submission of fraudulent bills of lading for the purpose of drawing down of the Islamic Acceptance Bills facilities extended by Islamic Bank. Kamalul was found to be personally liable. Kamalul was found personally liable for Aldwich and AEM's liabilities, as he had directed, authorised and procured the commission of the tort of deceit.

[644] So the allegedly legitimate use of the funds diverted by Kamalul from Aldwich into AEM and his personal accounts is not only not made out, but rebutted by a finding of another High Court. Impropriety is therefore beyond dispute in relation to the diversion of monies that ought properly to have been utilised for the bond programme.

[645] In the face of such incriminatory/negative findings it is incredulous that a submission of an absence of impropriety can reasonably be made by Kamalul and AEM.

[646] In essence the answer to this submission is that is a surfeit of wrongdoing and impropriety established on the factual matrix in the instant appeal directly implicating Kamalul and AEM. Therefore the learned judge rightfully invoked the doctrine of lifting and/or piercing the corporate veil in these circumstances. This is indeed one of those rare cases which justifies such a conclusion.

(b) Transfer of RM166m from Aldwich to AEM and a payment of RM16.7m to Kamalul

[647] The complaint of the appellants here is that there was no cross-examination of Kamalul on the transfer of RM166m from AB to AEM suggesting that such a transfer was undertaken dishonestly and/or fraudulently and/or unlawfully and/or that the monies were not due and payable to AEM. Kamalul apparently explained that the transactions in P5 related to BL drawdown payments. The crux of the complaint is that Kamalul was not challenged specifically and therefore was under no duty to explain the transfer of this large sum of money into AEM's account. Accordingly it is argued that there is no duty on the part of Kamalul or any other witness to explain this and no liability on the part of Kamalul or AEM in this respect.

[648] This aspect of the case has been dealt with to some extent, above. First of all it has been established, with no dispute from Kamalul, that he had control over AEM's accounts as well as Aldwich's accounts. Under the bond programme monies should have flowed from AEM to Aldwich and not the other way round. This was not explained. In point of fact Kamalul never divulged the fact that this sum of RM166m was diverted from Aldwich to AEM. This information only came about because the bondholders undertook the tracing exercise set out above.

[649] It then became incumbent upon Kamalul to explain how and why these monies were so diverted from Aldwich to AEM. This is a civil case concerning, the wrongful use or the wrongful dissipation of monies from Aldwich to AEM. That is why the several causes of action in breach of trust, imposition of a constructive trust and breach of statutory duties (under s 32B) were levelled against Kamalul. Therefore while the burden always remains on the plaintiff to establish its case on a balance of probabilities, once the initial onus of proof has been discharged, it becomes incumbent on the defendant, here Kamalul to meet or rebut that onus. The manner in which Kamalul needed to rebut the onus was to provide evidence to support his contention that the RM166m was utilised bona fide to repay alleged Maybank Islamic BLs.

[650] However he failed to do so. He merely made a bare averment orally in the course of his evidence. This was insufficient to discharge the onus on him to rebut exhs P5 and P7.

[651] To make matters worse, as discussed above there is a judgment against him from another High Court stipulating that the Kamalul was fraudulent in relation to these BLs, again as explained above. This too demolishes any contention that the monies diverted from Aldwich to AEM were utilised bona fide for the repayment of bank loans or BLs.

[652] In these circumstances the trial judge was entirely correct to conclude that Kamalul had indeed diverted monies wrongfully to AEM and was unable to account for the same. The foregoing factual matrix in itself establishes dishonesty and wrongful and/or fraudulent conduct. The mere allegation that it was not expressly put to Kamalul that he acted dishonestly or fraudulently does not and cannot detract from the position in law that it remained incumbent upon Kamalul to establish that the monies that were diverted from Aldwich were used for bona fide repayment of AEM's loans as he claimed. The trial judge was therefore entirely correct in stating that Kamalul had failed to produce any documentary evidence to establish that the alleged repayments were legitimate transactions.

[653] Finally, this is not a criminal prosecution for criminal breach of trust against Kamalul personally. It is a civil case where Kamalul was alleged to have acted in breach of trust and had diverted and was dissipating or holding monies rightfully due to Aldwich, and thereby the bondholders. His refusal to produce any bank accounts or other documentary evidence to establish what happened to the sum of RM166.7m, justifies the declaration of a constructive trust as against him and also AEM. Such refusal also justifies, as the trial judge ultimately found, that Kamalul had acted unlawfully or dishonestly or in breach of trust. We therefore find no merits in this aspect of the appeal either.

(c) Finding that AEM had a monies account with HSBC USA

[654] Kamalul and AEM maintain that in light of the fact that there was evidence that HSBC was the remitter of funds, any allegation that AEM had a money account in HSBC London is untrue. Accordingly they state that the bondholders' grievance that AEM failed to assign the money account to MIB is unfounded and without basis. As such it is contended that the trial judge erred in accepting the bondholders' position that the monies were in fact remitted out by HSC Bank London were in fact from AEM's monies account in HSBC Bank USA in London.

[655] The trial judge considered this issue exhaustively from paras 124–127 of the grounds of judgment. Her conclusion is a finding of fact based on the evidence before Her Ladyship. It is trite that this court can only interfere if her finding is plainly wrong. Firstly a perusal of the relevant cross-examination on record discloses that Kamalul agreed that AEM had separate conventional banking accounts to which accounts monies could be credited. He agreed that he nominated an account in HSBC Bank USA London to accept payment when AEM was to be paid for platinum.

[656] Kamalul also accepted as shown in the course of his cross-examination that there were funds in AEM's account with HSBC Bank USA, London.

[657] Kamalul further accepted in the course of cross-examination, as noted by the trial judge that upon sale of precious metals in London the proceeds of sale were first credited into AEM's money account with HSBC Bank USA, London prior to being remitted to AEM's account in Kuala Lumpur. Kamalul admitted that the money was brought back from London to AEM's Malaysian account.

[658] However on day 23, Kamalul altered his position and contradicted his earlier evidence by stating that AEM only had a metal (bullion) account in

HSBC Bank USA (as opposed to an account into which cash was remitted in London).This adversely affected his credibility and the content of this later testimony.

[659] DW8, Ken Pushpanathan also confirmed that proceeds of sale for business in London was placed into AEM's London account and then remitted to Malaysia to AEM's account with Maybank.

[660] From these facts as well as that of other witnesses (which it is unnecessary to reproduce here) the trial judge concluded that as foreign monies were remitted from AEM's HSBC Bank USA in London to AEM's account in Kuala Lumpur, ie US Dollars, those monies could only be converted by the receiving bank in Malaysia. Therefore the trial judge accepted the bondholders' submission that what AEM had in London was not a bullion or metals account but a conventional banking account.

[661] Kamalui and AEM's complaint is that it was not tenable for the trial judge to make this inference or conclusion in the absence of clear documentary proof to this extent. The flaw in that contention is that the only parties who would be able to produce evidence to disclose whether it was indeed a conventional banking account or a metal/bullion account is AEM and/or Kamalul and no one else. However this they failed and/or refused to do. In such circumstances it is wholly untenable for AEM and Kamalul to contend that the trial judge erred when so concluding. This is clearly a classic circumstance calling for the invoking of s 114(g) of the Evidence Act 1950, as AEM and Kamalul refused and/or failed to produce evidence entirely within their own possession to establish the nature of the account in London. It can only be presumed under the law that any such evidence if produced would be unfavourable to AEM and Kamalul. And that would be that AEM did indeed have a conventional banking account in London from which it remitted foreign monies to AEM's account in Kuala Lumpur. There was no bullion or metals account as contended.

[662] Therefore the trial judge did not err in any manner whatsoever in her conclusion. What comes to the fore instead is that there is no merit whatsoever in this appeal as there is no legal or factual basis for AEM and Kamalul to even make this submission.

(d) Finding Kamalul statutorily liable under s 32B SCA in failing to disclose the supplemental BSAs

[663] The trial judge found Kamalul statutorily liable under s 32B for failing to disclose the supplemental BSAs.

[664] It is clear from a perusal of Kamalul's testimony during cross-examination that he confirmed that he did not advise the lead arranger, MIBB, or Mayban Trustees or any other party that AEM was receiving business proceeds from businesses that had not been assigned to Aldwich by AEM. The trial judge concluded from the evidence that neither the two entities nor Kamalul advised the SC that AEM and not Aldwich through its revenue account had received the proceeds of most of the business contracts that were supposed to be novated or assigned to Aldwich and then MIBB. It is clear beyond dispute that the SC was never advised by Kamalul or Aldwich or AEM of the existence of the supplemental BSAs. Neither was the existence of the Supplemental BSAs disclosed in the IM. In point of fact the position taken by these three parties was that there was no necessity to disclose the supplemental BSAs because there would be no adverse repercussion. Alternatively they maintained that such disclosure would not have altered the situation because the non-assignable contract proceeds would still have gone into AEM's accounts for onward transmission to Aldwich. In short they maintained that there was no material change warranting disclosure to the SC.

[665] As has been concluded earlier on in the judgment the content of the IM was false and misleading. Therefore AEM and Kamalul in not disclosing the same to SC were in breach of their statutory obligations under s 32B(1) and 32B(3) of the SCA 1993.

[666] Kamalul particularly as the principal behind Aldwich as well as AEM was responsible to make full disclosure to the SC.

[667] There was a further failure to disclose the fact that not all of AEM's contracts were assigned or novated to Aldwich, again a material change that altered the entire structure and risk content of the bond programme, as has been borne out by subsequent events and the current suit.

[668] With respect to the contention that the bondholders made no allegation against Kamalul specifically, the answer must be that he was the principal behind both AEM and Aldwich and accordingly disclosure ought to have come from him.

[669] The finding in respect of s 32B against Kamalul in this civil suit for damages is important to form the basis for recovery under s 153. Therefore Kamalul's contention that s 32B(1) and 32B(3) are penal in nature does not affect the need to establish liability under those sections in order to procure damages by way of civil compensation under s 57 and/or 153 of the SCA 1993.

[670] In these circumstances the trial Judge was correct in her conclusion and there is no reason for this court to intervene. Her Ladyship is, with respect, far from plainly wrong in her conclusion.

(e) Finding that the transfer of the Junior Notes from AEM to Kamalul was not done at arm's length

[671] The bondholders' submission on this front was premised on the fact that AEM had transferred the junior notes to Kamalul without any consideration. This effectively made Kamalul a creditor of Aldwich as he became the owner of those notes. As such the bondholders contended that the transaction was not done at arm's length because there was no consideration for such a transfer of the notes. Moreover Kamalul controlled AEM. Kamalul also received a sum of RM27.5m by way of a redemption sum for these junior notes. This warrants and justifies the finding of the learned judge that the transfer by AEM (vide Kamalul) to himself was not an arm's length transaction, given that he procured the notes with no consideration and received monies from their redemption.

[672] Therefore Kamalul's complaint that the trial judge erred is not correct. Neither is their contention that the transfer of the junior notes valued at RM132m by AEM to Kamalul makes Aldwich a creditor of AEM. That is not the submission of the bondholders nor the finding of the trial judge.

[673] Kamalul's contention that he lawfully received the junior notes and was therefore legally entitled to receive the RM27.5m is equally misplaced and erroneous. In effect, Kamalul received a sum of RM27.5m simply because he transferred the junior notes from AEM to himself without any consideration. This amounts to a receipt of RM27.5m without having provided any consideration whatsoever. In short Kamalul had no right to the receipt of that RM27.5m and his having procured such monies is dishonest and places him in a position of conflict. This ground of appeal has no merit whatsoever.

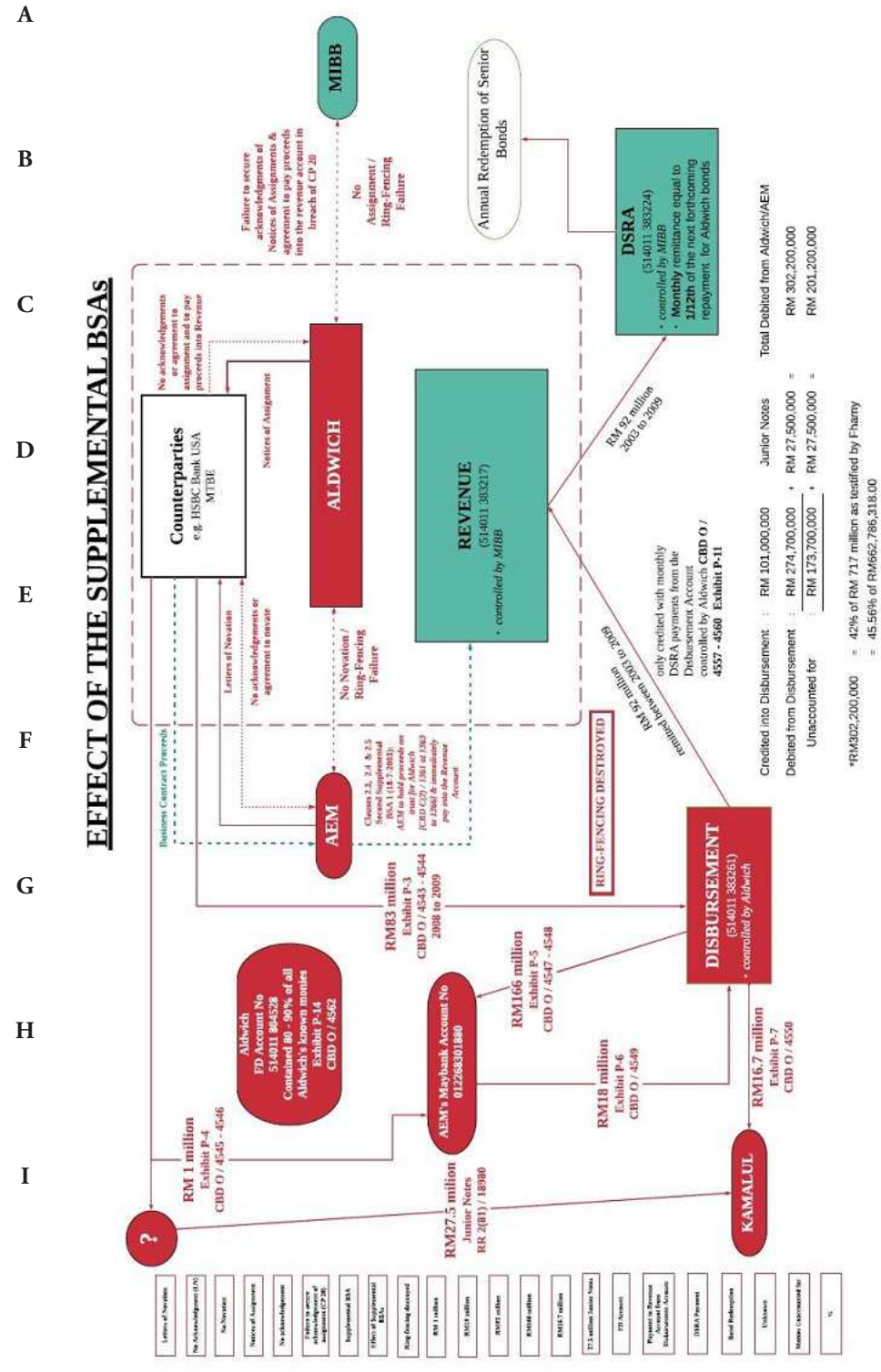
[674] For these reasons, particularly having perused the entirety of the evidence on record, it is evident to us that the trial judge was correct in finding that Kamalul and vide him, AEM had diverted enormous sums of monies due to Aldwich and thereby the bondholders to their own use. Such diversion was effected from Aldwich's disbursement account over the years. There was no accounting for these monies as we have pointed out earlier and as evidenced particularly by the exhs P5 and P7. Therefore we respectfully concur with the trial judge's findings that:

(a) the bondholders succeeded in establishing that AEM and Kamalul were holding monies belonging to Aldwich;

(b) those monies which were diverted were proceeds from the business contracts which were rightfully due to Aldwich and ultimately for the repayment of the bondholders, after operational expenses etc had been deducted as envisaged by the express provisions of the bond programme and its priority structure vis a vis the accounts. As such the diverted monies were and are held on trust by Kamalul and/or AEM for the benefit of the bondholders; and

(c) as such the bondholders are entitled to trace those monies and recover such monies from Kamalul and AEM.

[675] We append below a diagrammatic summarisation of the dissipation of funds as submitted by the bondholders. We concur, having studied the evidence in its entirety and considered the factual and legal matrix of this case that it accurately represents the dissipation of funds as a consequence of the failure to ensure that the ring fencing structure of the Aldwich Bond Programme was maintained.


EFFECT OF THE SUPPLEMENTAL BSAs
MTBB
Annual Redemption of Senior Bonds
Failure to secure acknowledgments of Notices of Assignments & agreement to pay proceeds into the revenue account in breach of CP 20
No Assignment / Ring-Fencing Failure
DSRA
(514011 383224)
• controlled by MTBB
• Monthly remittance equal to 1/12th of the next forthcoming repayment for Aldwich bonds
Counterparties
e.g. HSBC Bank USA
MTBE
No acknowledgements or agreement to assignment and to pay proceeds into Revenue
Notices of Assignment
ALDWICH
REVENUE
(514011 383217)
• controlled by MTBB
Letters of Novation
No acknowledgements or agreement to novate
No Novation / Ring-Fencing Failure
RM 92 million 2003 to 2009
Business Contracts Proceeds
AEM
Clauses 2.3, 2.4 & 2.5 Second Supplemental BSA (18.7.2003): AEM to hold proceeds on trust for Aldwich [CBD C(2) / 1361 at 1368 to 1368] & immediately pay into the Revenue Account
RM 92 million received between 2003 to 2009
only credited with monthly DSRA payments from the Disbursement Account controlled by Aldwich CBD O / 4557 - 4560 Exhibit P-11
RING-FENCING DESTROYED
RM83 million Exhibit P-3 CBD O / 4543 - 4544 2008 to 2009
DISBURSEMENT
(514011 383261)
• controlled by Aldwich
Credited into Disbursement : RM 101,000,000 Junior Notes Total Debited from Aldwich/AEM
Debited from Disbursement : RM 274,700,000 + RM 27,500,000 = RM 302,200,000
Unaccounted for : RM 173,700,000 + RM 27,500,000 = RM 201,200,000
*RM302,200,000 = 42% of RM 717 million as testified by Fhamy
= 45.56% of RM662,786,318.00
Aldwich FD Account No 514011 804528 Contained 80 - 90% of all Aldwich's known monies Exhibit P-14 CBD O / 4562
RM166 million Exhibit P-5 CBD O / 4547 - 4548
AEM's Maybank Account No 012268301888
RM18 million Exhibit P-6 CBD O / 4549
RM16.7 million Exhibit P-7 CBD O / 4550
RM 1 million Exhibit P-4 CBD O / 4545 - 4546
RM27.5 milion Junior Notes RR 2(81) / 18980
KAMALUL
?

The apportionment of liability by the trial judge

[676] We have concluded that no appellate interference is required as the trial judge did not err in her conclusions as to liability against the various defendants. To this end the trial judge awarded the sum of RM177,248,747.31 as against Aldwich, AEM and Kamalul.

[677] As against MIBB, MTB and EY, the trial judge, premised on her findings in terms of culpability for negligence, proceeded to apportion liability in the total sum of RM177,248,747.31 against these defendants as joint tortfeasors, as follows: 50 per cent against MIBB, 30 per cent against MTB and 20 per cent against EY. This accords with s 10 of the Civil Law Act 1956.

[678] As to the ration of apportionment, this was primarily a matter for determination by the trial judge, based on her assessment of how much culpability was to be accorded to each of the tortfeasors. Again, it cannot be said that she is patently or palpably wrong in so apportioning liability. We do not therefore interfere with Her Ladyship's apportionment in those terms.

Quantum

[679] Appeals were also filed in relation to the quantum of monies awarded. It was contended by 'MIBB, Mayban Trustees and EY' during the course of argument of these appeals that the trial judge erred in awarding the full sum of RM177,248,747.31 as against Aldwich, AEM and Kamalul and then the same sum again against the joint tortfeasors. It amounted, they contended, to claiming twice for the single loss of RM177,248,747.31.

[680] We are unable to accept the contention put forward by 'MIBB, Mayban Trustees and EY' because the causes of action against Aldwich, AEM and Kamalul differ diametrically from those against MIBB, MTB and EY. This is not a case of primary and secondary liability. The case for the bondholders against Aldwich is as the primary debtor under the bond scheme. The caes against Aldwich is also premised on a breach of statutory duty.

[681] The case against AEM and Kamalul is for breach of trust and as constructive trustees, apart from a breach of statutory duty against Kamalul. They are the entities or individuals who siphoned and took monies for their own use, which ought, rightfully to have been placed and channelled regularly into the tiered series of accounts in Aldwich, to enable the bond scheme to succeed to maturity. Therefore the causes of action against them are primarily

for recovery of actual funds taken or utilised for their own use.

[682] The case against MIBB, MTB and EY is premised on negligence (apart from a breach of contract) and a breach of statutory duty which enables the bondholders to bring a civil recovery action against them. These are fundamentally different causes of action. If not for the breaches of duty on the part of MIBB, MTB and EY the siphoning and/or removal or diversion of funds from Aldwich would not have occurred. These entities were found to be the proximate cause of the losses suffered by the bondholders to varying degrees of culpability.

[683] To that end the causes of action create separate and distinct liabilities against the two categories of appellants (or defendants in the court below). In other words there is a direct culpability against Aldwich, AEM and Kamalul whereby recourse is sought against them for default and recovery of monies taken and wrongfully utilised. It involves the element of dishonesty.

[684] It is not a case of a shared liability in terms of a primary and secondary wrongdoer or defaulter. Neither is it a case of accessory liability.

[685] The bondholders are therefore entitled to bring actions and seek recovery for the full amount of the loss suffered, from the various entities that unlawfully diverted the monies, as well as those entities that were negligent or breached statutory duties so as to make full recovery. This is evident from the statutory provisions of the SCA. With respect to MTB, we concur with the trial judge that it has the obligation as 'defaulting trustee to effect restitution to the trust estate by restoring its assets'.

[686] However it is equally clear that the extent of such losses borne by the tortfeasors is limited to the proportion of their culpability. Having recovered their losses from one or more of 'MIBB, Mayban Trustees and EY' however, the bondholders are not entitled to seek further or additional compensation beyond that claimed, from any of the other appellants.

[687] MIBB, MTB and EY further contend that damages should be assessed. We note that this issue was put before the trial judge who rejected the contention. It appears to us that the entirety of the trial was conducted with a view to the bondholders recovering the losses they suffered as a consequence of the failed investment. In so far as MIBB, MTB and EY are concerned the bondholders sought compensation for the losses they suffered by reason of the negligence of these individual entities. That compensation is equivalent to the losses the bondholders suffered by reason of not recovering the monies they had

loaned or invested under Aldwich bond scheme. That sum can clearly be computed as it comprises the debt due and owing by Aldwich to the bondholders. In these circumstances we do not comprehend the need for further assessment when the losses can be clearly computed. And that is indeed the basis for the claim made by the bondholders.

[688] Even if such an exercise were undertaken what further evidence are the parties (particularly the bondholders) expected to produce? They suffered a loss arising, inter alia, from the negligence of joint tortfeasors, as well as contraventions of provisions of the SCA, ie statutory breaches. The quantum of loss suffered is the balance of the investment monies due to them, if the scheme had proceeded to maturity. And that sum is equivalent to the sum due and owing under the debt which is computed at RM177,248,747.31. The basis for such computation has been explained and set out.

[689] As stated by the trial judge (adopting the submissions of MIBB and MTB) the compensatory damages in tort serve to place the bondholders in the same position as if their rights had not been infringed in so far as money can do so. And that sum, as stated before, may be readily computed because the losses suffered are essentially equivalent to the remaining debt due and owing by Aldwich to the bondholders.

[690] And that debt is equivalent to the sum of the event of default redemption value sum ('EOD redemption value') against MIBB, MTB and EY.

Statutory breach and measure of damages

[691] The bondholders point to Australian case-law ensuing from Australia's equivalent legislation, namely the Australian Trade Practices Act, which is in pari materia with our SCA, to make the point that the full balance sum of the debt, including profits are claimable as damages.

[692] In *Marks (in a representative capacity) & Others v GIO Australia Holdings & Others* (1998) 158 ALR 333 (HC) (a decision of the High Court of Australia) it was held that it is misleading to equate losses suffered under a statutory breach with losses suffered under contract. This is because for the law of contract expectation loss is recoverable for the loss of a valuable right in the form of a contractual promise. However it would not be tenable to do so in the case of misleading conduct under s 82 of their Trade Practices Act (in pari materia with s 153 of our SCA) because in such an instance the conduct is not contractual. Does it then mean that as losses on an expectation basis are not

recoverable, therefore the claimant cannot be compensated in an equivalent amount to that suffered if the representation were contractual? The answer must be no. Expectation and reliance loss are simply not heads of recovery utilised to assess losses for statutory breaches. Therefore recovery for such losses ought not to be pigeon-holed by way of analogy with actions in contract or tort.

[693] Further it was held that there is no specific limitation to the kinds of loss or damage that may be recovered for a statutory breach.

[694] And in *Murphy v Overton Investments Pty Ltd* (2004) 216 CLR 388 (HC) it was held that it was wrong to approach the statutory remedies available for statutory breaches of their Trade Practices Act by trying to draw an analogy with claims under the general law. While that might be helpful it was wrong to contend that the rules applicable in the law of the tort of deceit were applicable in determining or assessing damages. That would lead to the erroneous conclusion that only one type of loss was suffered in respect of a particular contravention under the Act. As such the references to 'loss or damage' under the relevant provisions of the Trade Practices Act of Australia ought not to be given a narrow meaning.

[695] And in *Henville and Another v Walker and Another* (2001) 182 ALR 37 (HC) it was held that while in most cases the measure of damages in tort is the most appropriate guide for determining an award of damages under s 82 of their Act, the courts were not bound to choose between the measure of damages in deceit or other torts or contract. Once the causal connection is established between the loss and the contravening conduct, there is nothing to say that the recoverable amount should be limited by drawing analogies with the general laws of contract or tort or equitable remedies although they afford guidance. It was concluded that the general principles for assessing damages ought to give way to solutions best adapted to give the injured claimant an amount which will most fairly compensate for the wrong suffered.

[696] We glean from the foregoing that:

(a) the provisions of the Australian Trade Practices Act has provisions which are in pari materia or similar to the SCA, particularly s 82 which is similar to our s 153;

(b) the case law in that jurisdiction has held that the general law of the assessment of damages in contract and tort as well as equitable remedies are not strictly applicable for statutory contraventions under their Trade

Practices Act;

(c) a narrow approach is not undertaken in assessing damages; rather an attempt is made to compensate the injured claimant fully for the loss he has suffered in any particular case as a consequence of the statutory contravention;

(d) the aforesaid case-law provides a useful guide to show how courts in other jurisdictions have assessed the quantum of damages available to injured claimants;

(e) given the similarity of the provisions and the underlying reasoning and rationale adopted by the High Court of Australia, it is not unreasonable to take into consideration the said approach in determining the basis on which damages ought to be awarded in a case involving statutory breaches such as the present;

(f) we are in agreement that in the context of the SCA (now the CMSA) the damages recoverable by the bondholders for the breaches of statutory duty ought not to be strictly confined to the rules developed for the assessment of damages solely in tort or contract. It may well be the case that in a given situation the loss awarded may be commensurate with the losses suffered by the application of rules utilised in tort or contract. But we concur that there ought to be no specific limitation imposed. The emphasis should be to enable the claimant to recover the losses suffered as a consequence of the statutory breach;

(g) in the instant case, that would include not only the monies invested by the bondholders in the Aldwich scheme but would also include the monies they were entitled to receive on the maturity of the bonds. This would therefore include the profit element as well as interest; and

(h) in the instant case it is important to bear in mind that the underlying purpose of the SCA is to protect investors (sophisticated investors where necessary as was the case here) from entering into schemes which were misleading or failed to reflect the truth of matters stated in the IM. Bearing in mind this rationale, it follows that the civil recovery provisions of the SCA similarly envisage and ought to be construed so as to allow investors who have suffered losses as a consequence of such contraventions to fully recover their losses. After all, it is as a consequence of the failure to disclose material facts and matters that would alter the basis of the investment that the investors had originally agreed to, that these investors, ie the bondholders had suffered losses. The failure to do so, despite knowing that the bondholders were entering into a scheme which had materially altered, and gave rise to

A serious risk, which the investors were unaware of, all warrant the bondholders recovering the losses they suffered.

[697] For these reasons we are unable to concur with EY, MIBB and MTB that the losses should be further assessed or limited so as to exclude profits and
B interest.

CONCLUSION

[698] For the reasons we have set out above, we are satisfied that the trial
C judge was not plainly wrong in her meticulous and careful conduct of the case as well as the ultimate findings of liability and damages/compensation against the various parties. We would therefore uphold Her Ladyship's findings of liability against each of the parties for the various causes of action pleaded. We further uphold Her Ladyship's award of compensation to the bondholders as
D against the various appellants.

[699] We therefore dismiss each of the appeals in their entirety. For avoidance of doubt we adjudge as follows:

E

Appeals Nos W-02(NCC)(W)-1699–08 of 2017, W-02(NCC)(W)-1696–08 of 2017, W-02(NCC)(W)-1708–08 of 2017, W-02(NCC)(W)-1709–08 of 2017, W-02(NCC)(W)-1710–08 of 2017, W-02(NCC)(W)-2075–10 of 2017, W-02(NCC)(W)-2077–10 of 2017, W-02(NCC)(W)-2167–10 of
F 2017 and W-02(NCC)(W)-2168–10 of 2017 are each dismissed with costs. The judgment and the orders of the High Court are upheld and affirmed. We award costs as follows:

(a) for MIBB's appeals No W-02(NCC)(W)-1699–08 of 2017 and No W-02(NCC)(W)-2077–10 of 2017, parties have agreed on costs of
G RM200,000 to the respondents subject to allocatur, for both appeals;

(b) for Mayban Trustees's appeals No W-02(NCC)(W)-1696–08 of 2017 and No W-02(NCC)(W)-2075–10 of 2017, parties have agreed on costs of RM100,000 to the respondents subject to allocatur, for both appeals;

H (c) for EY's appeals No W-02(NCC)(W)-1710–08 of 2017, No W-02(NCC)(W)-2167–10/2017 and No W-02(NCC)(W)-2168–10 of 2017 parties have agreed on costs of RM110,000 to the respondents subject to allocatur, for all three appeals;

I (d) for Aldwich and AEM's appeals No W-02(NCC)(W)-1708–08 of 2017 and No W-02(NCC)(W)-1709–08 of 2017, parties have agreed on costs of RM233,000 to the respondents subject to allocatur; and

(e) for Aldwich's counterclaim, parties have agreed on costs of RM70,000 to the respondents subject to allocatur.

Appeals dismissed and decision of the High Court affirmed.

Reported by Ashok Kumar